

(26,571)

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1918.

No. 485.

WILLIAM KINZELL, PETITIONER,

vs.

CHICAGO, MILWAUKEE & ST. PAUL RAILWAY COMPANY.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE  
STATE OF IDAHO.

INDEX.

	Original.	Print
Caption .....	1	1
Transcript of record from the District Court of Shoshone County	3	1
Complaint .....	3	1
Motion to elect, motion to strike, and demurrer to complaint	9	7
Answer .....	11	9
Special interrogatories and answers thereto.....	19	16
Verdict .....	19	17
Judgment .....	19	17
Certificate to judgment-roll .....	20	18
Notice of election.....	20	18
Instructions refused (requested by defendant).....	21	19
Instructions given (requested by plaintiff).....	27	25
Notices of appeal and service.....	36	34
Undertaking on appeal.....	38	35
Certificate to filing undertaking on appeal.....	39	36
Præcipe for record.....	39	37
Notice and motion for new trial.....	40	38
Specifications of errors.....	42	39

	Original.	Print
Motion for new trial.....	57	54
Specifications wherein evidence is insufficient to support or justify the verdict.....	58	55
Order denying motion for new trial.....	75	72
Judge's certificate certifying to papers used on motion for new trial .....	76	72
Notice of appeal from order denying new trial.....	77	73
Undertaking on appeal.....	77	73
Certificate <i>in re</i> filing undertaking.....	78	74
Stipulation as to supersedeas bond.....	79	75
Stipulation as to record on appeal.....	79	75
Præcipe for record.....	80	76
Clerk's certificate .....	81	77
Transcript of testimony.....	82	78
Colloquy between court and counsel.....	82	78
Testimony of William Kinzell.....	83	79
Hiram S. Lee.....	109	103
William Kinzell (resumed).....	109	104
Hiram S. Lee (resumed).....	111	106
Mrs. William Kinzell.....	123	117
Dr. O. D. Platt.....	127	121
Dr. John H. Shepherd.....	131	125
Dr. H. P. Marshall.....	144	136
Hyrum S. Lee (recalled).....	149	141
Motion to withdraw evidence.....	151	143
Plaintiff's case reopened, colloquy between court and counsel, &c. ....	152	144
Testimony of William Kinzell (recalled).....	152	144
Joseph F. Lake.....	155	146
N. E. Shanneseey.....	162	154
Oscar B. Moody.....	163	154
N. E. Nicholson.....	172	163
Michael McGraw.....	175	165
Adelbert A. Shields.....	180	170
Ned H. Lombard.....	181	171
B. J. Casey.....	183	173
James Marre .....	184	174
J. F. Brinton.....	187	177
Arch E. Campbell.....	188	178
J. F. Pinson.....	194	183
Edna Evans.....	195	184
Mrs. Bridget Delaney.....	199	188
Dr. B. E. Cornwall.....	201	190
Dr. Leonard E. Hanson.....	206	195
Arch E. Campbell (recalled).....	235	221
Dr. Tracy R. Mason.....	237	224
Dr. A. J. Bouffleur.....	244	230
William Kinzell (recalled).....	265	249
Hyrum S. Lee (recalled).....	270	254
Mrs. William Kinzel (recalled).....	271	255
Dr. J. H. Shepherd (recalled).....	272	256



# INDEX.

iii

	Original.	Print
Motion to direct verdict.....	272	256
Testimony of Dr. J. H. Shepherd (recalled).....	273	258
Dr. Leonard E. Hanson.....	275	260
Dr. John H. Shepherd (resumed).....	279	263
Dr. Leonard E. Hanson (recalled).....	283	267
Dr. Tracy R. Mason (recalled).....	287	271
Oscar B. Moody (recalled).....	288	272
William Kinzell (recalled).....	288	272
Minutes of trial, argument, colloquy, &c.....	289	273
Reporter's certificate to transcript of testimony.....	290	274
Service of transcript of testimony.....	291	275
Order settling transcript of testimony.....	291	275
Clerk's certificate to record.....	292	276
Service of record on appeal.....	292	276
Order of argument and submission.....	293	277
Judgment .....	293	277
Opinion, Rice, J.....	294	278
Præcipe for record.....	298	282
Clerk's certificate .....	298	282
Writ of certiorari and return.....	300	283



1-2 In the Supreme Court of the State of Idaho.

WILLIAM KINZELL, Respondent,

vs.

CHICAGO, MILWAUKEE & ST. PAUL RAILWAY COMPANY, a Corporation, Appellant.

TRANSCRIPT ON APPEAL.

Appeal from the District Court of the First Judicial District of the State of Idaho in and for Shoshone County.

Filed March 16, 1917. I. W. Hart, Clerk, by M. G. Whitney, Deputy.

Wm. D. Keeton, St. Maries, Idaho; John P. Gray, Cœur d'Alene, Idaho; W. F. McNaughton, Cœur d'Alene, Idaho; James A. Wayne, Wallace, Idaho, Attorneys for Respondent.

Geo. W. Korte, Seattle, Washington; Robt H. Elder, Cœur d'Alene, Idaho, Attorneys for Appellant.

3 In the District Court of the First Judicial District of the State of Idaho in and for the County of Shoshone.

WILLIAM KINZELL, Plaintiff,

vs.

CHICAGO, MILWAUKEE & ST. PAUL RAILWAY COMPANY, a Corporation, Defendant.

*Complaint.*

The plaintiff in the above entitled action alleges and respectfully shows to the court:

I.

That during all of the times hereinafter mentioned the defendant, Chicago, Milwaukee & St. Paul Railway Company, was, ever since has been and still is a railway corporation duly organized, created and existing under and by virtue of the laws of the State of Wisconsin and engaged in operating a line of steam railway as a common carrier, for hire, of passengers, merchandise, live-stock and other personal property by rail between the City of Chicago, in the State of Illinois, and the City of Seattle, in the State of Washington, and that the said defendant during all of said time was engaged in run-

ning and operating locomotives and freight trains and passenger trains in the transportation of interstate commerce and freight from points in the State of Idaho, Montana, South Dakota, Minnesota, Wisconsin, Illinois and other states to points in the State of Washington, and from points in the State of Washington to points and towns and cities in other states.

That during all of the times hereinafter mentioned the plaintiff was a resident and citizen of the State of Washington, residing at Lavista, in the State of Washington.

That the main line of the railway of the defendant runs in and through the County of Shoshone, State of Idaho, and the said defendant maintains ticket offices and stations in said County of Shoshone, State of Idaho.

## II.

That on the 16th day of February, 1916, and at the time of the injury herein complained of, and for some time prior thereto, the plaintiff was an employe of the defendant and engaged in working upon the tracks and bridges of the defendant, which were being used and which for a long time prior thereto had been used in interstate commerce, and in keeping in a proper state of repair and improvement such instrumentalities and keeping the same in proper condition during such use.

## 4

## III.

That at the time of the accident and injury to the plaintiff hereinafter alleged, on the 16th day of February, 1915, the plaintiff was engaged in employment on the main line track of the defendant railway company extending from said City of Seattle, Washington, to the said City of Chicago, Illinois, and between the towns of Lavista, Washington, and Ewan, Washington, over which said tracks the defendant was and for a long time prior thereto had been daily operating locomotives hauling interstate passenger trains and interstate freight trains.

That the plaintiff at the time of the injury herein complained of had charge of a machine called a doser machine or dirt spreader, which was used in connection with spreading gravel or dirt used by the defendant in the improvement of its bridges and tracks. That at the time of the injury to the plaintiff the plaintiff had been engaged under the direction of the defendant in filling a bridge, which bridge was called No. E E 140. That the said bridge and railway track on both sides thereof had for several years prior to the said 16th day of February, 1915, been used by the said defendant in interstate commerce. That the defendant was engaged in filling its said bridge on its main line track with dirt and gravel. That the said defendant hauled, or caused to be hauled, the gravel to the bridge by trains of gravel cars from a point on its line westerly from the place where the plaintiff was working, and it was the duty of the plaintiff in operating the said doser or dirt spreader, after gravel cars had dumped the

gravel or dirt alongside the track, to operate the said doser along the track for the purpose of spreading out the gravel on each side of the defendant's said track, the doser or dirt spreader having wings on either side for that purpose which were adjustable.

That at the time of the accident and injury to the plaintiff the said doser or dirt spreader was near the west end of the bridge above referred to, and the gravel was being brought from a point westerly of said bridge.

That the train hauling said gravel and train crew thereon were not under the supervision or control of the plaintiff and the plaintiff had no authority or supervision over the said employes on said gravel train. The plaintiff, however, did advise and direct the said employes as to the points where he desired dirt or gravel to be dumped.

The machine above referred to and called a doser was constructed upon wheels and ran along the said track and was so constructed that it could be coupled to one of the gravel cars. It was the duty of the employes of the defendant in charge of the gravel train, before dumping the said gravel, to couple the said train onto the doser and push the said doser back along the rails of the railroad. That the defendant provided brakemen for that purpose, and the plaintiff had no authority or responsibility in connection with coupling the said doser onto the said train or the operation of the said train, other than to advise the employes of the defendant on said train as to where he desired the gravel to be dumped.

#### IV.

That about eleven o'clock on the said 16th day of February, 1915, while the plaintiff was in the orderly and regular discharge of his duties upon said doser, and engrossed in his duties, the defendant and its employes in charge of said gravel train carelessly, recklessly and negligently so operated the said locomotive engine and gravel train over and upon said track and at such a high and excessive speed as to run the said train into the said doser upon which the plaintiff was then in the orderly and regular discharge of his duties and to strike the said doser with great and unusual force, thereby knocking the plaintiff off of said doser and in between the said gravel cars and the doser and dragged the said plaintiff over the said rails, ties, and dirt alongside thereof, and injured the plaintiff as hereinafter alleged.

#### V.

Plaintiff further alleges that at the time of the injury herein complained of the engine which was being operated by the defendant was pushing a large number of dump gravel cars, about twenty-five in number.

That in the train crew operating said train there was an engineer, fireman, conductor, and two brakemen. That it was the duty of the defendant company in operating its said train to have one of its employes upon the front of said train as it was being pushed along

said track in order to keep a proper lookout and to give proper and adequate signals and warnings. And it was the duty of the defendant company to further have a second brakeman between the front brakeman and the engineer to transmit, when necessary, the signals by the brakeman on the front of the train to the engineer. That there was a brakeman on the front car, which was being pushed by the said engine, but the remaining employes upon said train were in the cab of the engine and there was no brakeman between the said front brakeman and the engine.

Plaintiff alleges that the employes in charge of the defendant's said train and the said engine *was* negligent and careless and reckless in not keeping a proper or any lookout in the direction in which the said train was being pushed.

6

## VI.

Plaintiff further alleges that the said train was being pushed and propelled over the said track at a high, negligent and excessive rate of speed, to-wit, the speed of at least ten miles an hour, and plaintiff alleges that any speed in excess of four miles an hour would have been and was unreasonably high and dangerous, and it was the practice and custom of the defendant and its employes to approach said bridge at a slow rate of speed and not to exceed four miles an hour.

Plaintiff alleges that the said defendant recklessly, carelessly and negligently propelled its said train up against the said doser car upon which the plaintiff was engaged in the performance of his duties, and struck and bumped and collided with the same at said high and dangerous rate of speed.

## VII.

Plaintiff further alleges that he saw the train approaching some distance away and observed the front brakeman on the front of said train, and relying upon the said defendant and its employes to proceed cautiously and with due care in performing their duties to the plaintiff, who was in plain sight upon the said doser, and where his duties required him to be, plaintiff proceeded with the performance of his duties and became engrossed therein, and was examining and looking at the said bridge for the purpose of ascertaining just where the load should be dumped, and was examining to see that the said doser was in proper position, and the said train thereupon approached the said doser and ran into and bumped the said doser at such unusual and excessive speed and with such great and unusual force as to jar and knock the plaintiff off of said doser and between the wheels of said doser and the wheels of the said gravel cars, as hereinbefore alleged, and injuring the plaintiff as hereinafter alleged.

## VIII.

Plaintiff further alleges that the said defendant was further negligent in not having a tail air hose on the rear car of said train—that

is, a tail air hose on the car furtherest from the engine so that the brakeman on the front car of the train in operating the said air hose by means of a valve could stop the train in case of necessity. That if the defendant had had a tail air hose and valve on said train at the position of said brakeman on the train, the said brakeman could have stopped the train by the application of said air brakes before striking the doser upon which the plaintiff was engaged in the discharge of his duties. And even if the plaintiff was knocked from said doser and between the wheels of said doser and the wheels of said gravel car, by the use of said tail air hose and valve, had one been provided and used, the said train could have been stopped almost immediately and the injuries to the plaintiff avoided. Plaintiff further alleges that when being thrown from the said doser his clothing caught in an arch bar bolt on the front gravel car.

### IX.

Plaintiff further alleges that the said doser and this plaintiff were in plain sight of the approaching train for a quarter of a mile at least, and the injury to the plaintiff could have been avoided after the plaintiff was or should have been discovered by the employees of the defendant upon the said train, if they were or had been keeping a lookout.

Plaintiff further alleges that this plaintiff was discovered (\*Amendments permitted by order of court, October 31st, 1916. L. R. Adams, Clerk District Court. By C. J. Callahan, Deputy.) *\*or should have been discovered*, by the said defendant and its employe, to-wit, the said brakeman upon the front car, *\*who saw or should have seen the plaintiff*, in ample and sufficient time to have stopped the said train after the said brakeman discovered this plaintiff in a position of danger and engrossed in the performance of his duties, notwithstanding which, the defendant continued to propel said train and cars over said track without reducing the speed thereof or attempting to stop the same until after the doser was struck.

### X.

Plaintiff further alleges that after the said doser was struck and plaintiff knocked off the train, the said engineer in charge of said engine negligently and carelessly failed to apply the automatic air brakes upon said engine and train and thereby the plaintiff was pushed and dragged and rolled along and over the said track and rails and ties between the wheels of the said doser and the said gravel cars.

Plaintiff further alleges that the said engineer in charge of said train had he been keeping a proper or any lookout could have seen the said doser upon said track and this plaintiff thereon in ample time to have stopped the train before striking said doser.

Plaintiff alleges that the said defendant and its employes in charge of said train negligently, carelessly and recklessly propelled the said



train at such unusual and high rate of speed against the said doser without having proper or adequate control thereover.

Plaintiff further alleges that it was the duty of the defendant to either stop the said train before coupling onto the said doser, or at the time of coupling onto the said doser, or to make an easy coupling thereof, and that the defendant was negligent and careless in bumping into the said doser in the manner hereinbefore alleged.

## XI.

Plaintiff further alleges that prior to the happening of said accident and injury to the plaintiff so caused by the negligence of the defendant, the plaintiff was in good, sound, strong bodily health, free from physical imperfection or ailment; by trade and occupation a locomotive engineer and able to earn and did earn at his said calling the average sum of \$200 per month. That the plaintiff's earning capacity has been practically destroyed. That plaintiff was long confined to a hospital and in bed, during all of which time he suffered excruciating and terrible pain. And plaintiff is forever barred because of said injuries from holding a position with any railroad company as engineer.

At the time of plaintiff's injury he was twenty-nine years of age and his expectancy of life was over thirty-six years.

## XII.

That as a result of said injury the plaintiff was crushed, bruised and maimed and suffered the following injuries, to-wit:

A fracture of the right shoulder blade; an injury to the right shoulder joint; a paralysis of the right circumflex nerve; deep flesh wounds over the left hip and lower part of the spine; a deep flesh wound in the region of the rectum, and as a result of these he is and will be forever unable to move the right arm more than twenty degrees from his body; that his right arm has been permanently destroyed for the performance of any manual labor and forever disabled; that he suffered a permanent injury to the tendons, nerves, ligaments and muscles and bones in and about his right shoulder and right arm, and his right arm is paralyzed; that the injuries to his rectum have permanently affected the control of his bowels, (\*Amendment permitted by order of court, October 31st, 1916. L. R. Adams, Clerk District Court. By C. J. Callahan, Deputy.) \*and has further suffered a permanent injury to his left hip permanently and seriously interfering with the use of the said left hip and leg, and that as a result of said injuries the plaintiff suffered great mental and physical pain and anguish and still suffers said severe pain from the said injuries and will continue to suffer from the same during the rest of plaintiff's life. That the result of said injuries was to render the plaintiff permanently maimed and crippled and disfigured to his damage in the sum of \$50,000, no part of which has been paid.



9 Wherefore, plaintiff prays judgment against the defendant in the sum of \$50,000, and for his costs and disbursements herein sustained.

JOHN P. GRAY,  
*Cœur d'Alene, Idaho.*  
W. D. KEETON,  
*St. Maries, Idaho.*

(Duly verified.)

(Filed May 8, 1915, at 3 o'clock P. M.)

(Title of Court and Cause.)

*Motion to Elect, Motion to Strike, and Demurrer.*

Comes now the defendant, the Chicago, Milwaukee & St. Paul Railway Company, and moves the court to require the plaintiff to elect whether he is seeking to recover under the common law, or is seeking to recover under the act of Congress of April 22, 1908, as amended on April 5th, 1910, entitled: "An Act Relating to the Liability of Common Carriers, by Railroad, to their employes in certain cases," commonly referred to as the Federal Employers' Liability Act, to the end that the defendant may assert its defenses given to it under either of said rights of recovery:

The defendant moves to strike from the said complaint the following matter:

I.

To strike the last four (4) lines of paragraph (5) of said complaint upon the ground that the whole of said matter contained therein is a conclusion, and not a statement of a fact, and is immaterial and redundant on that account.

II.

For the same reasons the defendant moves to strike the last five (5) lines of paragraph six (6) of said complaint.

III.

For the same reasons the defendant moves to strike the last eleven (11) lines from paragraph (10) of said complaint.

IV.

For the same reasons and for the further reason that the alleged matter is argumentative, speculative, and has no proper place in the pleading, the defendant moves to strike from paragraph eight (8) all that portion, commencing with the words: "that if the defendant," found in the 6th line from the top of said paragraph, down to

the word "avoided," found in the third line from the bottom of said paragraph eight.

10

V.

For the same reasons, last above asserted, the defendant moves to strike from paragraph nine (9) the first six (6) lines thereof.

The defendant demurs to the complaint of the plaintiff, served herein, upon the grounds:

(a) That the said complaint does not state facts sufficient in law to constitute a cause of action.

(b) That the said complaint is indefinite and uncertain in the following particulars:

## I.

That it is alleged in paragraph four (4) that "plaintiff was in the orderly and regular discharge of his duties upon said doser, and engrossed in his duties," and it is not stated therein of what plaintiff's duties consisted, and in what duties plaintiff was engrossed.

## II.

That it is stated in paragraph four (4) that said train was running at a "high and excessive speed," and it is not stated therein at what speed said train was running.

## III.

That it is not stated what the duties of the plaintiff were, or consisted at the time he claims he saw the train approaching him, and at the time he observed the brakeman on the front of said train, and it is not stated in what duties he claims he was at the time engrossed, as set forth in paragraph seven (7) of said complaint.

The defendant further demurs to the said complaint upon the ground that it is uncertain in this: That the allegations set forth in paragraphs four (4), five (5), six (6), and seven (7) are inconsistent, and in conflict with the allegations set forth in paragraph eight (8), nine (9), and ten (10). All the allegations in the former are opposed to the allegations contained in the latter.

GEO. W. KORTE,

*Seattle, Washington;*

ROBT. H. ELDER,

*Cœur d'Alene, Idaho,*

*Attorneys for Defendant.*

Admission of service of the within Motion to Elect, Motion to Strike and Demurrer, by the receipt of a true and correct copy thereof

at Cœur d'Alene, Kootenai County, Idaho, this 1st day of June, 1915, is hereby admitted.

JOHN P. GRAY,  
W. F. McNAUGHTON,  
*Attorneys for Plaintiff.*

(Filed June 2, 1915.)

11

Court Journal "J," Page 62.

Regular September, 1915, Term, Fourth Judicial Day, September 10th, 1915.

The Defendant's Motion to Elect, Motion to Strike and Demurrer having heretofore been submitted to the Court for consideration and decision and by the Court taken under advisement, now at this time, the Court having heard the argument of counsel and being fully advised in the premises ordered that the motion to elect be, and the same hereby is sustained; that the motion to strike be and the same hereby is sustained as to paragraphs I, II, IV and V of said motion and denied as to paragraph III of said motion, and that the demurrer be, and the same hereby is overruled. It was further ordered that the plaintiff be, and he hereby is granted fifteen (15) days from this date to elect whether he seeks to recover under the common law or under the Act of Congress of April 22, 1908, as amended April 5th, 1910, entitled "An act relating to the Liability of Common Carriers, by Railroad, to their employees in certain cases."

(Title of Court and Cause.)

*Answer.*

Comes now the above named defendant, and for answer to plaintiff's complaint, says:

I.

Answering paragraph one (I) of plaintiff's complaint, the defendant, the Chicago, Milwaukee & St. Paul Railway Company, admits that it is a corporation duly organized and existing under and by virtue of the laws of the State of Wisconsin, and engaged in operating a line of steam railway as a common carrier, for hire, of passengers, merchandise, live-stock and other personal property, by rail between the City of Chicago, in the State of Illinois, and the City of Seattle, in the State of Washington; and that the said defendant was engaged in running and operating locomotives, freight trains, and passenger trains in the transportation of interstate commerce from points in the States of Idaho, Montana, South Dakota, Minnesota, Wisconsin, Illinois and other states to points in the State of Washington, and from points in the State of Washington to points and towns and cities in other states.

But defendant denies that it was or is engaged exclusively in interstate commerce, and alleges the fact to be that it was at said time, and all the times mentioned in plaintiff's complaint, engaged in interstate commerce and intrastate commerce, and, in fact, 12 was doing many things connected with the operation of its railroad which were not in any respect interstate commerce, but pertained solely to matters outside of any commerce, whatsoever, of commerce moving between the states.

Further answering paragraph one (I) defendant denies that during all of the time, or at any time, mentioned in plaintiff's complaint, plaintiff was a resident or citizen of the State of Washington, residing at Lavista, in the State of Washington, or any other place in the State of Washington.

Further answering paragraph one (I) the defendant admits that the main line of its railway runs in and through the County of Shoshone, in the State of Idaho, and that said defendant maintains ticket offices and stations in said County of Shoshone, State of Idaho.

## II.

Aswering paragraph two (II) of plaintiff's complaint, the defendant admits that on or about the 16th day of February, 1915, the plaintiff was an employe of the defendant, and that on or about the said date, while the plaintiff was in the employ of said defendant, said plaintiff was injured.

The defendant denies that at said time, or prior thereto, or at any time, the plaintiff was engaged in working upon the tracks or bridges, or upon any track or bridge, of the defendant, which were used in interstate commerce, or in keeping in a proper state of repair or improvement such interstate lines, or any interstate lines, or in keeping the same in proper condition, during such use or any use.

## III.

Answering paragraph three (III) of plaintiff's complaint, defendant denies that at the time of the alleged accident or injury to the plaintiff, or on or about the 16th day of February, 1915, or at any time, the plaintiff was engaged in employment on the main line track, or any track, of the defendant railway company, extending from said City of Seattle, Washington, to the said City of Chicago, Illinois, and between the town of Lavista, Washington, and Ewan, Washington, over which said tracks the defendant was, or for a long time prior thereto, had been daily operating locomotives, hauling interstate passenger trains or interstate freight trains.

Further answering paragraph three (III) the defendant admits that the plaintiff, at the time of the alleged injury, was in charge of a machine, called a doser machine or dirt spreader; but denies that said machine was used in connection with the spreading of gravel or dirt, or used by the defendant in the improvement of its bridges or tracks.

13 Denies that at the time of the alleged injury to the plaintiff, the plaintiff had been engaged under the direction of the defendant, or at all, in filling a bridge designated as No. EE140, or any bridge.

Admits that said bridge No. EE140, and the railroad track on both sides thereof, had for several years prior to the 16th day of February, 1915, been used by the said defendant in interstate commerce.

Denies that the defendant was engaged in filling said bridge, or any bridge, on its main line track, or any track, with dirt or gravel or at all. Denies that the defendant hauled, or caused to be hauled, or moved at all, the gravel, or any gravel, to the bridge, or any bridge, by trains or gravel cars from a point on its line westerly, or from any point, from the place where the plaintiff was working.

Denies that it was the duty of the plaintiff, in operating the said doser or dirt spreader, after gravel cars had dumped the gravel, or any gravel or dirt along side the track, to operate the said doser along the track for the purpose of spreading out the gravel or any gravel on each side of the defendant's said track, or any track.

Admits that the said doser or dirt spreader had wings on either side which were adjustable.

Further answering paragraph three (III), the defendant states that it has no information and belief as to whether or not, at the time of the alleged accident and injury to the plaintiff, the said doser or dirt spreader was near the west end of the bridge above referred to, and the gravel was being brought from a point westerly of said bridge, and therefore, by reason of the lack of said information, the defendant denies that at the time of the alleged accident or injury to the plaintiff, the said doser or dirt spreader was near the west end of the bridge above referred to, or that the gravel, or any gravel, was being brought from a point westerly of said bridge, or from any place.

Further answering paragraph three (III) the defendant denies that the said train was hauling gravel, and denies that said alleged train or train crew thereof were under the supervision or control of the plaintiff, or that the plaintiff had authority or supervision over said employees on said train.

Denies that the plaintiff did advise or direct the said employees as to the points where he desired dirt or gravel to be dumped.

Admits that the machine called a doser was constructed upon wheels and ran along the said track, and was so constructed that it could be coupled to one of the gravel cars.

Denies that it was the duty of the employees of the defendant, in charge of the gravel train, or in charge of any gravel train, 14 or of any train, before dumping the said gravel, or any gravel, to couple the said train on to the doser, or to push the said doser back along the rails of the railroad, or that the defendant provided brakemen for that purpose, or that the plaintiff had authority or responsibility in connection with the coupling of the said doser on to the said train, or the operation of said train, to

advise the employes of the defendant on said train, as to where he desired the gravel to be dumped.

#### IV.

Answering paragraph four (IV) the defendant denies that about eleven o'clock on the said 16th day of February, 1915, or at any time, or while the plaintiff was in the orderly or regular discharge of his duties, or in the discharge of any duties or duty, upon said doser, or engrossed in his duties, or at all, the defendant, or its employes, in charge of said gravel train, carelessly or recklessly or negligently, or at all, operated the said locomotive engine or gravel train, or any train, over or upon said track, or any track, or at such a high or excessive speed, or at any high or excessive speed, as to run the said train into the said doser upon which the plaintiff was then in the alleged orderly or regular discharge of his duties, or in the discharge of his duties, or any duties, or to strike the said doser with great or unusual force, or any force, or thereby knocking the plaintiff of said doser or in between the said gravel car, or the doser; or drag the said plaintiff over said rails or ties or dirt along side thereof, or any rails or ties or dirt; or injured the plaintiff as herein-after alleged, or in any manner or at all.

#### V.

Answering paragraph five (V), defendant denies that at the time of the alleged injury, the engine which was being operated by the defendant was pushing a large number of dump gravel cars, or any dump gravel cars, about twenty-five (25) in number, or any number.

Further answering said paragraph five (V) the defendant admits that in the train crew operating said train there was an engineer, foreman, conductor, and two brakemen.

Denies that it was the duty of the defendant in operating its said train to have one of its employes upon the front of said train, as it was being pushed along said track in order to keep a proper lookout, or any lookout, or to give proper or adequate signals of warnings, or any signals of warnings.

Denies that it was the duty of the defendant to further have a second brakeman between the front brakeman and the engineer, to transmit the signals, or any signals, by the brakeman on the front of the train to the engineer.

15 Admits that there was a brakeman on the front car, which was being pushed by the said engine, but denies that the remaining employes upon said train were in the cab of the engine, or there was no brakeman between the said front brakeman and the engine.

## VI.

Answering paragraph six (VI) of said complaint, the defendant denies that the said train was being pushed or propelled over said track at a high or negligent or excessive rate of speed, or any high or negligent or excessive rate of speed, or a speed of ten miles an hour, or at any such speed whatsoever.

Defendant denies that any speed, or speed in excess of four miles an hour, would have been or was unreasonably high or dangerous, or high, or dangerous; and denies that it was the practice or custom of the defendant or its employes to approach said bridge at a slow rate of speed, or speed not to exceed four miles an hour.

## VII.

Answering paragraph seven (VII) of said complaint, defendant admits that the plaintiff saw the train approaching some distance away, and observed the front brakeman on the front of said train; but denies that said plaintiff relied upon said defendant or its employes to proceed cautiously, or with due care, or at all, in performing their duties or any duties to the plaintiff; or that the plaintiff was in plain sight, or could be seen upon said doser, or where his duties required him to be.

Denies that plaintiff proceeded with the performance of his duties, or became engrossed therein, or was examining or looking at the said bridge for the purpose, or at all, of ascertaining where the load should be dumped, or was examining to see that the said doser was in proper position; and denies that the said train approached the said doser or ran into it, or bumped the said doser at the alleged unusual or excessive speed, or any unusual or excessive speed, or with such great or unusual force, or any great or unusual force, or any force, as to jar or knock the plaintiff off of said doser, or between the wheels of said doser, or the wheels of said gravel cars, as hereinbefore alleged, or alleged at all, or injured plaintiff.

## VIII.

Answering paragraph eight (VIII) the defendant denies that it was negligent in not having a tail air hose, or any air hose, on the rear car of said train furthest from the engine, so that the brakeman on the front car of the train, in operating the said air hose by means of a valve, could stop the train in case of necessity, or at all.

16 Denies that when plaintiff was being thrown from said doser, or thrown at all, his clothing caught on the arch bar bolt, or any bolt, on the front gravel car, or any gravel car.



## IX.

Denies that plaintiff was discovered by the said defendant, or its employe, the said brakeman, or any employe, upon the front car or any car, in ample or sufficient time, or any time, to have stopped the said train after the said brakeman discovered the plaintiff in a position of danger, or in any position, or engrossed or doing anything at all in the alleged performance of his duties, and denies that defendant continued to propel said train of cars over said track without reducing the speed, or at any speed, or at all, or attempting to stop the same until after the doser was struck, or at all.

## X.

Answering paragraph ten (10) the defendant denies that after the said doser was struck, or at all, or after plaintiff was knocked off the train, or at all, the said engineer in charge of said engine negligently or carelessly failed to apply the automatic air brakes, or any brakes upon said engine or train, or thereby, or in any manner, the plaintiff was pushed or dragged or rolled along over the said track, or rails or ties, between the wheels of the said doser or the said gravel cars, or any gravel cars.

Defendant denies that if the said engineer in charge of said train had been keeping a proper or any look-out, he could have seen the said doser upon said track, or the plaintiff thereon, in ample time, or any time, to have stopped the train before striking said doser.

Defendant denies that its employes in charge of said train negligently, or carelessly, or recklessly, or at all, propelled the train at the alleged unusual or high rate of speed against the said doser, without having proper or adequate control thereover, or in any manner.

Defendants denies that it was its duty to either stop the said train before coupling onto the said doser, or at the time of coupling unto said doser, or to make an easy coupling thereof, or that the defendant was negligent or careless in bumping into the said doser in the manner alleged, or in any manner whatsoever.

## XI.

For answer to paragraph eleven (XI) of said complaint, the defendant states that it has no information or belief upon the subject to enable it to answer the allegations contained in said paragraph eleven, as to whether, prior to the happening of said alleged  
17 accident and injury, the plaintiff was in good, sound, strong bodily health, free from physical imperfection or ailment, and by trade and occupation a locomotive engineer, and able to earn and did earn at his said calling the average sum of two hundred (\$200.00) dollars per month; and by reason of the lack of said information, and belief, denies that the plaintiff, prior to the alleged happening of said accident or injury, was in good, or sound or strong bodily health, or free from physical imperfection or ailment, or by



trade or occupation a locomotive engineer, or able to earn or did earn at his calling the average sum of two hundred (\$200.00) dollars per month, or any sum.

Denies that plaintiff's earning capacity has been practically destroyed or destroyed in any manner or at all, or that the plaintiff was long confined to a hospital or in bed, or that during all of said time, or at any time, the plaintiff suffered excruciating or terrible pain, or any pain, or that plaintiff is forever barred, or barred in any manner, because of said injury, or by reason of said injuries, from holding a position with any railroad company as engineer, or in any other capacity.

Defendant states that it has no information or belief sufficient to enable it to answer the allegation as to whether at the time of the plaintiff's alleged injury he was twenty-nine (29) years of age, and his expectancy of life was over thirty-six (36) years; therefore, by reason of said lack of information, the defendant denies that at the time of plaintiff's alleged injury he was twenty-nine years (29) of age, or his expectancy of life was over thirty-six (36) years.

## XII.

For answer to paragraph twelve (XII) of said complaint, the defendant denies that as a result of said alleged injury, the plaintiff was crushed or bruised or maimed, or suffered a fracture of the right shoulder blade, or an injury to the right shoulder joint, or a paralysis of the right circumflex nerve, or a deep flesh wound over the left hip or the lower part of the spine, or a deep flesh wound in the region of the rectum, or as a result of said alleged injury, or any injury, the plaintiff is or will be forever, or at all, unable to move his right arm more than twenty (20) degrees, or any degrees, from his body, or that the movement of his right arm has been disabled or injured in any manner or at all, or that his right arm has been permanently destroyed or destroyed in any manner or at all for the performance of any manual labor, or is forever disabled, or disabled in any manner or at all. Denies that he suffered a permanent injury, or any injury, to the tendons, or nerves, or ligaments, or muscles, or bones in or about his right shoulder, or right arm; and denies that his right arm is paralyzed.

18 Denies that the injuries to his rectum have permanently affected the control of his bowels, or that as a result of said injury, or any injury, the plaintiff suffered great mental or physical pain, or any mental or physical pain or anguish, or still suffers said severe pain, or any pain from said alleged injury, or will continue to suffer from the same through the rest of plaintiff's life, or for any period of time, or at all.

Denies that the result of said injury was to render the plaintiff permanently maimed or crippled, or disfigured, or maimed or crippled or disfigured in any manner or at all.

Denies that the plaintiff is damaged in the sum of fifty thousand (\$50,000) dollars, or in any sum at all.

Further answering the said complaint, and as a first affirmative defense thereto, the defendant alleges: That if the plaintiff was injured in the manner as alleged and set forth in his said complaint, it was due to a risk which the said plaintiff assumed in that the said plaintiff, as alleged by him, was an experienced railroad man, fully acquainted with his entire surroundings, able to observe the work and all the things which were being done at the time he was injured. That there was nothing concealed about the alleged proximate cause of injury; that everything was open and above board, and said plaintiff knew, or by the exercise of ordinary care, should have known and appreciated the alleged cause of his said alleged injury.

Further answering said complaint and as a second affirmative defense thereto, the defendant alleges that if the plaintiff was injured as set forth in his said complaint, the proximate and sole cause of his said alleged injury was his own, negligence and his own voluntary act or acts and without any fault whatever on the part of the defendant, and had the said plaintiff observed his surroundings, and used his senses, the said accident would not and could not have happened.

Wherefore, said defendant prays that said action be dismissed, and that it go hence, and have judgment against the plaintiff for its costs and disbursements incurred herein.

GEO. W. KORTE,  
*Seattle, Washington;*  
ROBT. H. ELDER,  
*Coeur d'Alene, Idaho,*  
*Attorneys for Defendant.*

(Duly verified.)

Service of the within answer admitted by receipt of a copy thereof at St. Maries this 20th day of Sept. 1915.

WM. D. KEETON,  
*Attorney for the Plaintiff.*

(Filed Sep. 23, 1915.)

19

(Title of Court and Cause.)

*Special Interrogatories and Answers Thereto.*

If your verdict shall be for plaintiff please answer these questions.

1. How much is the whole amount of damages sustained by the plaintiff by reason of the injuries suffered by him?

Answer: Thirty Five Thousand Dollars *Dollars.*

2. If you find plaintiff was also negligent, what sums should be deducted from the whole amount of damages sustained by the plaintiff as the just share thereof attributable to his negligence?

Answer: None. *Dollars.*

(Filed November 4th, 1916.)

(Title of Court and Cause.)

*Verdict.*

We, the jury in the above entitled case find for the plaintiff and assess his damages at \$35,000.00.

JOHN W. EVIRS, *Foreman.*  
E. D. BOOTH.  
E. M. CIRCLE.  
JOSEPH PEILA.  
JOHN M. PRIVETT.  
JOHN H. FOSS.  
PETER BAUER.  
JOHN H. HENDRICKSON.  
CHRIS ANDERSEN.

(Filed November 4th, 1916, at 10 o'clock A. M.)

(Title of Court and Cause.)

*Judgment.*

This action came on regularly for trial, the said parties appearing by their attorneys, Messrs. John P. Gray, William D. Keeton and James A. Wayne, counsel for plaintiff, and Messrs. George W. Korte and Robert H. Elder, counsel for defendant. A jury of twelve persons was regularly empanelled and sworn to try the said case. The witnesses on the part of the plaintiff and defendant were sworn and examined. After hearing the evidence, the arguments of counsel and instructions of the court the jury retired to consider of their verdict and subsequently returned into court with the verdict signed by nine of the said jurors, who being called answered to their names and say: "We the jury in the above entitled case find for the plaintiff and assess his damages at \$35,000.00."

Wherefore, by virtue of the law, and by reason of the premises aforesaid, it is ordered and adjudged and decreed that said plaintiff have and recover from said defendant the sum of Thirty-five Thousand (\$35,000.00) Dollars, with interest thereon at the rate of seven (7) per cent per annum from the date hereof until paid, together with plaintiff's costs and disbursements incurred in this action amounting to the sum of \$151.75.

Dated and signed this the 4th day of November, A. D. 1916.

WILLIAM W. WOODS, *Judge.*

(Filed Nov. 4, 1916.)

(Title of Court and Cause.)

*Certificate to Judgment Roll.*

I, the undersigned, Clerk of the District Court of the First Judicial District of said State, in and for said County, do hereby certify the foregoing to be a true copy of the Judgment entered in the above entitled action, and recorded in Judgment Book "E" of said Court on Page 480.

And I further certify that the foregoing papers, hereto annexed, constitute the Judgment Roll in said action.

Witness my hand and the Seal of the said District Court this 4th day of November, 1916.

[SEAL.]

L. R. ADAMS, *Clerk*,  
By C. J. CALLAHAN,  
*Deputy Clerk.*

(Filed November 4th, 1916.)

(Title of Court and Cause.)

*Notice of Election.*

Notice to Chicago, Milwaukee & St. Paul Railway Company, a Corporation, to George W. Korte and to Robert H. Elder and Elder and Elder:

Comes now the plaintiff above named and pursuant to an order entered in the above entitled action, requiring the said plaintiff to elect whether said plaintiff seeks to recover under the common law or under Acts of Congress, commonly referred to as Federal Employers' Liability Act.

Now Therefore, you and each of you are hereby notified that the said plaintiff elects and is seeking to recover in the above entitled action under the Act of Congress of April 22nd, 1908,  
21 and Acts amendatory thereof and supplemental thereto, commonly referred to as Federal Employers' Liability Act.

W. D. KEETON,  
*St. Maries, Idaho;*  
JOHN P. GRAY,  
*Cœur d'Alene, Idaho,*  
*Attorneys for Plaintiff.*

Service of the within Notice accepted and a true copy thereof received at Cœur d'Alene, Ida., this 14th day of September, 1915.

GEO. W. KORTE,  
ROBT. H. ELDER,  
*Attorneys for Defendant.*

(Filed Sep. 17, 1915.)

(Title of Court and Cause.)

*Instructions Refused.*

(Requested by Defendant.)

Instruction One.

You are instructed that this action is brought under what is commonly known as the Federal Employers' Liability Act, which Act, so far as is necessary for your information in this case, provides, in substance, that every common carrier by railroad, while engaged in commerce between any of the several states or territories, shall be liable in damages to any person suffering injury while employed by such carrier in such commerce, when such injury results, in whole or in part, from the negligence of any of the officers, agents or employes of such carrier; and it is admitted in this case that unless the plaintiff comes within the provisions of this Act, he has no right of recovery in this action. It is necessary, in order that plaintiff may recover under this Act of Congress, that he shall have been, at the time he received his injury, employed in interstate commerce, and unless the plaintiff was so employed at the time he received his injury, he cannot recover in this action.

If, after you have fully considered all the evidence in this case, you conclude from a preponderance thereof that, at the time plaintiff was injured, he was generally and regularly engaged with others in connection with a work train operating wholly within the State of Washington, and at said time was assigned to, and in charge of a dozer, a machine used in connection with said work train, which said work train and dozer were then and there engaged solely in the work of hauling and depositing dirt, earth and gravel used in making a fill or embankment under a bridge, at a point on the line of the railroad of the said defendant within the State of Washington;

22     ton; and if you further find that said fill or embankment was, at said time, incomplete, and in such a state of construction that no rails or ties could be, or were, laid thereon and that the same was not used by the said defendant in transporting any of its cars or trains moving in interstate commerce; and if you further find that said fill or embankment was being constructed as an independent structure and in no manner necessary for the security or betterment of the physical condition of said bridge, and that said bridge was in such physical condition that it was capable of sustaining itself independently of the said fill or embankment and was used independently of the said fill over which to transport interstate commerce, and that the sole purpose of the making of said fill was, when completed, to lay ties and rails thereon and operate cars and trains thereover in interstate commerce—then I instruct you that the plaintiff while performing the work in connection with said work train and dozer car at the time he received his injury, would not be engaged in interstate commerce within the meaning of the law and would

not be entitled to recover in this action, even if otherwise shown to be so entitled.

And if you should so find, then your labors will be at an end and you will return your verdict for the defendant, for it is essential, in order that plaintiff may recover in this action, that he should have been employed in and performing a service in interstate commerce at the exact time when he received his said injury.

Refused.

W. W. WOODS, *Judge*.

#### Instruction Four.

You are instructed that the fact that there was no tail air hose or air hose apparatus installed upon, or connected with the operation of said dirt train, has nothing to do with this case.

Not only was defendant not required to have such apparatus upon said train or cars, but such fact was known to the plaintiff at the time he received his injury, and, knowing such fact, he cannot complain of the want thereof.

Refused.

W. W. WOODS, *Judge*.

#### Instruction Five.

You are instructed that if you find from a preponderance of the evidence that, on account of the position in which plaintiff was standing on the dozer car and his inattention to the movements of the dirt train against the dozer car at the time the coupling was made, plaintiff, notwithstanding the speed of the said train against the said dozer car, would have, in any event, been thrown from said dozer car, as the evidence shows he was thrown—then I instruct

you that the speed of that train—notwithstanding the evidence shows it was excessive and unusual—was not the proximate cause of plaintiff's injuries, and he cannot recover herein.

Refused.

W. W. WOODS, *Judge*.

#### Instruction Six.

If you find that the defendant was negligent in the manner in which the train was being moved against the dozer car for the purposes of coupling thereto, then you should pursue your inquiry further and determine whether or not the plaintiff, Mr. Kinzell, assumed the risk of his employment at the time and under the circumstances under which the accident occurred. Upon this point I advise you as follows:

Assumption of risk—unlike contributory negligence—may be free

from any suggestion of negligence on the part of the servant, even though the risks be obvious. The risks may be present notwithstanding the exercise of all reasonable care on his part. Some employments are necessarily fraught with dangers to the workman, danger that must be, and is, confronted by him in the line of his duty. Such dangers as are normally and necessarily connected with the occupation are presumably taken into account in fixing the rate of wages; and a workman of mature years is taken to assume risks of this sort whether he is actually aware of them or not.

But risks of another sort, not naturally connected with the work, may arise out of the failure of the master to exercise due care in the manner and method of doing the work. These risks the servant assumes the moment he becomes aware of the danger and observes and appreciates the risk of injury therefrom. The servant cannot recover for any injuries resulting from the negligence of the master where the conditions constituting such negligence are known to the servant or are obvious and plainly observable by him and the peril clearly apparent.

Under this last rule of assumption of risks, even though you find that the dirt train was being moved toward and against the dozer car at an excessive and unreasonable rate of speed, still, if the evidence shows that Kinzell, by the exercise of his senses, knew, or ought to have known thereof, and knew and appreciated the danger therefrom, and, though having such knowledge and appreciation, he failed to do that which an ordinarily prudent man would have done under the circumstances—you must then find that he assumed the risk and he cannot recover in this action.

The evidence leaves no doubt that the plaintiff Kinzell had knowledge of the approach of the train and that it would come against the dozer car where he was standing, and the only question upon this branch of the case is whether his experience and intelligence was such as to enable him to appreciate, and that he did appreciate, the danger from the manner in which the said train was being moved against the dozer car. If he did, he took the risk and your verdict will be for the defendant.

Refused.

W. W. WOODS, *Judge*.

#### Instruction Eight.

You are instructed that it is no part of the master's duty to warn an intelligent and experienced servant not to be careless in the presence of known dangers or not to unnecessarily run the risk of injury from the operation of known physical forces. If it is shown by the evidence that plaintiff knew, or as a reasonable man, under the circumstances, ought to have known and appreciated, from where he was standing upon the dozer car, that the coupling of the cars together would be likely to cause such a jar or jolt of the dozer car as would throw him down between the cars and injure him, and if the evidence shows that he voluntarily remained in such position upon



said dozer car, and if it further shows that the necessities of his work did not require him to do so, and that he could have taken a position of absolute safety upon said dozer car, and that his duties did not prevent him from doing so, then, under the circumstances shown by the evidence, the plaintiff assumed the risk and your verdict will be for the defendant.

Where there are two ways of performing the duties of a servant—the one way safe and the other dangerous—it is the duty of the employe to select the safe way if he has opportunity to do so; and if, in such choice of ways, he voluntarily creates a danger to himself which ordinary prudence, under the circumstances, would have enabled him to avoid, he takes the risk from such choice and has no right in law to recover from the master.

Refused.

W. W. WOODS, *Judge*.

#### Instruction Nine.

You are instructed that because the instrumentalities employed by railroads must be powerful, must exercise very great force, must bring into play numerous elements that are dangerous to human life, it is necessary that those who deal with them should themselves exercise proper caution. A man has no right, because a fire is built in his neighborhood, to put his finger or his clothes into it and burn them and then say "I may sue and recover damages." He must take care of himself even as the railroad must take care of its duties and its employes. These obligations are mutual and it is the law, and it is your duty to require it as the law, that, if a man voluntarily puts himself into a dangerous position—does so voluntarily, when there are other safe positions in connection with the discharge of his duty in which he can place himself—he cannot recover of the railroad company for damages for that injury which he has caused solely by his own negligence. That is the law. It is your duty to regard it, and you have no right to say that, because this railroad company is a great and powerful instrumentality, it must pay for the plaintiff's injuries whether or not he was negligent or careless. Whether he was negligent or careless is for you to say, and it does not altogether depend upon the opinion of any one of the witnesses. You are to use the common sense for which you were summoned here as jurors, and, for yourselves, say whether this plaintiff acted carefully in standing on the dozer and doing what he claims he was doing at the time the coupling was being made; whether he exercised prudence when he could have accomplished the same end by watching the movement of the said coupling and so could have avoided being knocked from the said car when the coupling was actually made. And if you believe that he carelessly and without due regard for his own safety, remained upon said dozer car when he could, by the exercise of ordinary care, have watched it and taken



a safe position—then he was guilty of negligence which proximately contributed to his injuries.

Refused.

W. W. WOODS, *Judge*.

### Instruction Twelve.

The defendant has alleged in its answer, and has introduced proof, that plaintiff himself was guilty of negligence which was the direct cause of the injury complained of. Now the plaintiff's negligence, if you find that he was negligent, is defined in the same manner as that of the defendant. If you believe from the evidence that the plaintiff, at the time the said coupling was being made, was doing that which a prudent man would not have done under the circumstances, or, if he failed to do that which an ordinarily prudent man would have done under all the existing circumstances, having in view the probable danger of his receiving the injury while said coupling was being made,—then I charge you that he is, with respect thereto, guilty of negligence; and if you find that his act was the proximate cause of his injury and that the act of the trainmen in making this coupling was not the proximate cause of the injury to plaintiff, then it will be your duty to find a verdict for the defendant.

In this connection, if you believe from the evidence that the plaintiff's injury was caused partly by the negligent act, if any, of the trainmen in making the coupling, and partly by the negligent act, if any, of the plaintiff, then it will be your duty to compare the same

in accordance with the instructions which I shall give you.

26 In order to make clear to you what is meant by the comparison of negligence declared by the federal law to be the duty of the jury to make, let me say that your first inquiry should be:—Was the defendant guilty of negligence? Your second inquiry should be:—Was the plaintiff negligent? Your third inquiry should be: In what degree did the negligence of the plaintiff and the negligence of the defendant contribute to the accident?

Under the federal law it is made your duty to determine what proportion. If the plaintiff's negligence contributed to or caused the accident, to the extent, we will say, of one-third of the entire negligence, then the plaintiff's damages would be reduced one-third; if to the extent of one-half, then his damages would be reduced one-half; if to the extent of two-thirds, then his damages would be reduced two-thirds; and, if his negligence was alone the cause of the accident, then, of course, that would wipe out the damages and your verdict should be in favor of the defendant; if you find that the negligence of the two is equal—that is, that the Railway Company is guilty of negligence and the plaintiff is guilty of equal negligence—you must reduce the damages one-half.

Refused.

W. W. WOODS, *Judge*.

## Instruction Fourteen.

If you come to that stage of the case in which you are to make up a verdict for the plaintiff, it will be your duty then to determine how much to allow the plaintiff, if anything, for the diminution or decrease, if any he has sustained, of his power to earn in the future what he had been earning in the past. This element of damage is not certain or fixed and is a kind of estimated damage.

To find out what plaintiff was capable of earning, you must find out what he did earn in the past and how much his capacity to do his former work has been lessened, if at all, by reason of his injury; and, having ascertained that, find out how old he is and the number of years he probably will live, considering his age, health and habits, and the fact known to us all that men do change their mode of life; that the average man's physical capacity and earning power naturally decline rapidly after fifty years of age, and that some die sooner than others. No one can tell how long a man is going to live, but you can approximate it or average it. In arriving at the amount, you cannot, in any event, allow plaintiff a lump sum equal to what he would receive during the estimated time of his life's expectancy; that would be too much. You must take into account the

27      earning power of that sum of money. A sum of money now in hand is worth more than a like sum payable in the future, and the future payments which will be derived from said sum through its earning power must be discounted or subtracted from the aggregate amount, otherwise plaintiff will receive more than his earning capacity would have earned him had he received no injury. Whatever sum you determine should be allowed him for the lessening of his earning capacity, if the evidence shows it has been lessened, it must not exceed the present cash value of the aggregate amount which you estimate that his earning capacity has been impaired.

Of course, if you find that plaintiff can now, or will in the future, earn as much as he has been earning in the past, then his earning capacity has not been impaired or damaged and you will allow him nothing on this element of damage.

Refused.

W. W. WOODS, *Judge*.

## Instruction Sixteen.

You are instructed that there is no evidence in this case to warrant a finding that the plaintiff was, at the time of receiving his injury, employed in interstate commerce or performing a service in said commerce. You will, therefore, return a verdict for the defendant.

Refused.

W. W. WOODS, *Judge*.

Filed November 3, 1916.

(Title of Court and Cause.)

*Instructions Given.*

(Requested by Plaintiff.)

Instruction No. 1.

You are instructed that negligence is the failure to do what reasonable and prudent persons would ordinarily have done under the circumstances of the situation, or doing what reasonable and prudent persons under the existing circumstances would not have done.

Given.

W. W. WOODS, *Judge.*

Instruction No. 2.

You fix the standard for reasonable, prudent and cautious men under the circumstances of the case as you find them according to your judgment and experience of what that class of men do under these circumstances, and then test the conduct involved and try it by that standard, and neither the judge who tries the case, nor any other person, can supply you with the criterion of judgment by any opinion he may have on that subject.

Given.

W. W. WOODS, *Judge.*

28

Instruction No. 3.

The jury is instructed that in this case the burden of proof is upon the plaintiff to establish the negligence of the defendant company and this the plaintiff must do by a preponderance of the evidence. The preponderance of the evidence means the greater weight of the evidence—it does not depend upon the number of witnesses and it does not mean the greater number of witnesses.

Given.

W. W. WOODS, *Judge.*

• Instruction No. 4.

You are instructed that if you find from all of the evidence of the case that the brakeman Moody and the engineer and other employees on the train at the time of the happening of the accident and injury to the plaintiff in this action were employed by the defendant company as such employees upon the train at the time in question I charge you that the defendant company is bound by the acts of each of such employees within the scope of his employment and authority by the defendant and the defendant is responsible for any act or acts of negligence of such employees and if either or any

of such employees was guilty of any negligent action or conduct as such employee in the discharge of his duty and employment at the time of the accident the defendant is responsible therefor and the employee's negligence in respect to the discharge of his duties as such employee of the defendant company upon the said train in question, if any, was negligence of the defendant.

Given as changed by interlineation.

W. W. WOODS, *Judge*.

Instruction No. 5.

You are further instructed that the defendant in this case has interposed the defense that the plaintiff was guilty of contributory negligence—the burden of proof is upon the defendant to establish contributory negligence by a preponderance of the evidence. This may be shown by the evidence adduced on behalf of the plaintiff as well as by evidence introduced by the defendant. Contributory negligence on the part of the defendant is the failure to do what reasonable and prudent persons would ordinarily have done under the circumstances of the situation, or doing what reasonable and prudent persons under the existing circumstances would not have done. You are instructed that if under all the facts and circumstances of the case by a preponderance of the testimony you find that the plaintiff was engaged in interstate commerce and was injured as a result of the negligence of the defendant the fact that the plaintiff was guilty of contributory negligence is not a complete defense or  
29      bar to his right to recover damages in the case, but the jury should in such case diminish the damage in proportion to the amount of negligence attributable to the plaintiff, and as hereinafter instructed.

Given as modified.

W. W. WOODS, *Judge*.

Instruction No. 6.

If, under all of the evidence in this case and by a fair preponderance thereof, you find that the plaintiff is entitled to recover in this action, you will then proceed to consider the amount of the damages to be awarded to him in your verdict. The plaintiff if entitled to recover, is entitled to fair and reasonable compensation in money for the actual loss which he has sustained on account of the loss of the use of his limbs as shown by the facts in this case and in arriving at the amount of his compensation or compensatory damages you have a right to take into consideration the plaintiff's age, occupation, intelligence and qualification shown by the evidence and his earning capacity and in this connection you have a right to take into consideration the wages or salary which he was earning at and a short time prior to the happening of the accident and injury and you may also take into consideration any pain or suffering which he may have undergone or suffered, loss of time, diminution of earning

capacity, discomfort and general physical disability so far as the same may have affected his ability to walk, run or move about in the usual and ordinary way and all other facts and circumstances shown by the evidence or properly deducible from the evidence in the case and to award to him such sum and such sum only as in your sound judgment and opinion will fairly and reasonably compensate him in money for the injuries sustained by him and in no event, however, to exceed the sum of \$50,000.00. You must likewise take into consideration any contributory negligence of the plaintiff if any you find.

Given.

W. W. WOODS, *Judge*.

Instruction No. 7.

You are the exclusive judges of the credibility of the witnesses and of the weight to be given to the testimony of each witness. You may take into consideration the interest, bias or prejudice of any witness, if such interest, bias or prejudice exists, the probability or improbability of the testimony, and any and all other facts and circumstances in evidence which in your judgment would add to or detract from the credibility of the witnesses or the weight of their testimony. If there is a conflict in the testimony you must reconcile it, if you can. If not, you may believe or disbelieve any witness or witnesses, according as you may or may not think them entitled to credit. If you believe that a witness has knowingly testified  
30 falsely as to any material matter you are at liberty to disregard the entire testimony of such witness, except insofar as he may be corroborated by other credible evidence.

Given.

W. W. WOODS, *Judge*.

Instruction No. 8.

In this case if the entire jury is not able to agree, a verdict may be rendered by a number of the jury less than twelve, but not less than nine. If all agree the verdict must be signed by the foreman selected by you. If less than your whole number agree, the verdict must be signed by all who agree.

Given.

W. W. WOODS, *Judge*.

Instruction No. 9.

The jury are instructed that if the plaintiff was upon the dozer in the discharge of his duty and that that was the proper place for him to be at the time of the accident in question that then the defendant owed to the plaintiff the duty not to propel its train over the track at such a high and excessive rate of speed as to strike the train so

forcibly as to be dangerous to the safety of the said plaintiff so upon the dozer so that if you shall find from the evidence that the plaintiff was upon the dozer in the performance of his duties and that the defendant negligently propelled or pushed its train of cars against the said dozer with unreasonable force and at such speed as to obviously place the plaintiff in danger or injury and that thereby by such force and speed the plaintiff was jarred,—and thrown from the train as a result of such unusual and unreasonable bump if any then you are instructed that the defendant would be guilty of negligence.

Given.

W. W. WOODS, *Judge*.

Instruction No. 10.

The jury is instructed that it is for you to say that under all the circumstances of the case the plaintiff operated its train in a prudent and careful manner, or whether its train was operated in such an unreasonable, negligent and imprudent manner as to charge it with negligence as herein defined. You are instructed that if it was the duty of the defendant to make an easy coupling and not to strike the dozer at an unreasonable speed or with unreasonable force taking into consideration the surroundings and if you find it was negligent for the defendant to make the coupling and strike the dozer as it did strike it on the occasion in question then the risk of such negligence, if such you find, was not assumed by the plaintiff and the defendant would be responsible therefor.

Given.

W. W. WOODS, *Judge*.

31

Instruction No. 11.

You are further instructed that if the plaintiff was in the performance of his duties at the time of his accident and was engrossed therein as claimed by him and that the train of cars approached the said dozer and ran into and bumped the same at such unusual and excessive speed and with such great and unusual force as to jar and knock the plaintiff from said dozer and between the wheels of the dozer and the gravel cars the defendant was guilty of negligence.

Given.

W. W. WOODS, *Judge*.

Instruction No. 12.

You are further instructed that if under the evidence in this case you find that it was usual and customary and reasonable for the defendant to provide what is termed as a tail air hose on the rear end of the train and that by the operation thereof the brakeman on the train could by means of said valves stop the train in case of



necessity, and if you further find from the evidence that the defendant was negligent and careless in not so equipping its said train and that the presence thereof would have prevented a collision with the dozer with such force as to knock and jar the plaintiff therefrom, then you are instructed that the defendant would be guilty of negligence.

Given.

W. W. WOODS, *Judge*.

Instruction No. 13.

You are further instructed that it is the duty of defendant in operating its said train and cars over the track to use reasonable care to keep a lookout ahead and if said defendant and its employees in charge of the said train by keeping a lookout could have seen the said dozer upon the track and the plaintiff thereon in ample time to have stopped the said train, or to have reduced the speed of the train so as to make an easy coupling, but notwithstanding such facts failed to keep such lookout, or keeping such lookout failed to reduce the speed of the train so that an easy coupling might be made and that by reason thereof struck the train with great and unusual force and violence jarring and knocking the plaintiff off of the said dozer, then the defendant was guilty of negligence.

Given.

W. W. WOODS, *Judge*.

Instruction No. 14.

The jury are further instructed that every common carrier by railroad while engaging in commerce between any of the several states or territories, or between any of the states or territories shall be liable for damages to any person suffering injury while he is employed by such carrier in such commerce where such  
 32 injury results in whole or in part from the negligence of the officers, agents or employees of such carrier, or by reason of any defect or insufficiency due to its negligence in its cars, engines, appliances, machinery, track, roadbed, rails, boats, wharves and other equipment. In an action brought against such common carrier by railroad to recover damages for personal injuries to an employee, the fact that the employee may have been guilty of contributory negligence shall not bar a recovery, but the damages shall be diminished by the jury in proportion to the amount of negligence attributable to such employee. In this case it is conceded that the defendant was engaged in interstate commerce at the time of the accident to plaintiff and that its main line track was used in interstate commerce. You are instructed that the plaintiff was engaged as an employee in interstate commerce if the work which he was doing was so closely connected therewith as to be a part of it. Tracks and bridges are as indispensable to interstate commerce by railroad as are engines and cars and sound, economic reasoning unites with

settled rules of law in demanding that all of these instrumentalities be kept in repair. The work of keeping the roadbed, track and bridges in a proper state of repair and upkeep while thus used in interstate commerce is so closely related to such commerce as to be in practice and in legal contemplation a part of it. If you find from the evidence therefore that the instrumentality, to wit, the railroad track line and the railroad bridge where the plaintiff was working had become an instrumentality in such commerce and that the plaintiff was engaged in the work of maintaining the same in proper condition after they had become such instrumentalities and during their use as such, then it is your duty to find that the plaintiff was engaged in interstate commerce. The true test is, was the work in question a part of the interstate commerce in which the carrier was engaged? In determining this matter you should take into consideration that the statute under which the plaintiff is proceeding proceeds upon the theory that the carrier is charged with the duty of exercising proper care to prevent or correct any defect or insufficiency in its cars, engines, appliances, machinery, track, roadbed, rails, boats, wharves and other equipment used in interstate commerce, so that if you find that the plaintiff was engaged in any work which was being done for the purpose of preventing or correcting any defect or insufficiency and in repairing or keeping in repair or good condition any such instrumentality, railroad track or bridge which had already been devoted to interstate commerce, then you are instructed that the plaintiff was engaged in interstate commerce.

Given.

W. W. WOODS, *Judge*.

33

Instruction No. 15.

The court instructs you that it is a general rule that a servant entering into employment which is hazardous assumes the usual risks of the service and those which are apparent to ordinary observation, and when he accepts or continues in the service with the knowledge of the character of the instrumentalities from which injury may be apprehended, he also assumes the hazard incident to the situation. Those not obvious assumed by the employe are such perils as exist after the master has used due care and precaution to guard the former against danger, and the defective condition of the instrumentalities or appliances which, by the exercise of reasonable care of the master may be apprehended and obviated, and from the consequences of which he is relieved from the responsibility to the servant by reason of the latter's knowledge of the situation is such as is apparent to his observation, or are not known to the employe.

Where there are two ways of performing the duties of a servant—the one way safe and the other dangerous—it is the duty of the employe to select the safe way if he has an opportunity to do so; and if, in such choice of ways, he voluntarily creates a danger to himself which ordinary prudence, under the circumstances would



have enabled him to avoid, he takes the risk from such choice and has no right in law to recover from the master.

Given.

W. W. WOODS, *Judge*.

Instruction No. 16.

Should your verdict be for the plaintiff you are prohibited from arriving at such verdict by a resort to chance. It is not proper to take the enumeration of the amount each of you should think proper to give the plaintiff, add the same together, and divide the amount thereof by twelve or any other number, and take the quotient as the amount to be returned as your verdict, as that method would be illegal.

I guard you, therefore, against that method, or any resort to chance. You are to review all the evidence, pay consideration to the arguments of your fellow jurors, and by the exercise of calm, deliberate judgment, in view of all of the facts and circumstances as shown by the evidence, and the law as given to you by the Court, say by your verdict what you believe to be the actual right.

Given.

W. W. WOODS, *Judge*.

Filed November 4, 1916.

34

(Title of Court and Cause.)

*Instructions Given.*

(Requested by Defendant.)

Instruction No. Two "A."

The burden of proof is on the plaintiff to establish, by a preponderance of the evidence, that the act in which he was engaged at the time he received his injury was one which he was required to do and within the scope of his employment.

If plaintiff at the time of his injury was engaged in the performance of an act not required to be done by him in his said employment, he was a mere volunteer, and, as such volunteer, he cannot hold the defendant liable on account of any injuries he may have thus received.

If you find from the evidence that plaintiff's general employment was that of operating the dozer machine when in action, and if you further find from a preponderance of the evidence, that plaintiff was thrown from said dozer car and injured while attempting to place in position the knuckle of the coupler of the dozer car so that the dirt train would properly couple to the said dozer car, and that he was not ordered or required to do such act and had nothing to do with the coupling of the dozer car to the dirt train, but that such duty devolved upon the brakeman or other trainmen connected with

the operation of said dirt train, and that his attempting to place the coupler in position was the proximate cause of his injury, then plaintiff was a mere volunteer as to such act and he cannot hold the defendant liable on account of any injuries he may have received while thus attempting to help in coupling the dirt train to said dozer car and your verdict will be for the defendant.

Given.

W. W. WOODS, *Judge.*

Instruction Three "A."

You are instructed that, under the pleadings in this case, plaintiff had nothing to do with the management or control of the coupling of the train to said dozer car. He was not employed for that purpose. There were trainmen connected with the movement of said train whose duty it was to see to the proper coupling of said cars. If, then, you find from the evidence, that plaintiff, on his own motion, undertook to assist in arranging the coupler on the dozer car, he was a mere volunteer to whom the defendant owed no duty, except not to wantonly or wilfully injure him. In this case there is neither plea nor proof that the employes of the defendant wantonly or wilfully injured plaintiff. Therefore, your verdict will be for the defendant, if, by a preponderance of the evidence, you find that the plaintiff was engaged in arranging the coupler on the dozer car, when the dirt train coupled to the said car, and because there-  
35 of he was thrown down and received his alleged injury.

Given.

W. W. WOODS, *Judge.*

Instruction Ten "A."

It is a matter of common knowledge that jolts and jars are usual incidents in the operation of coupling freight or work-train cars together, and this fact the plaintiff Kinzell is in law bound to know. You are therefore instructed that negligence on the part of the defendant cannot be inferred from the mere fact that plaintiff was injured as a result of a jar or jolt caused by the coming together of the dirt train and the dozer car while being coupled. Plaintiff must go farther and prove that the jar or jolt from the coupling complained of was other than a necessary incident to the careful operation of the train in making the coupling; he must prove that the jarring or jolting was due to the unnecessary and excessive speed with which the dirt train was moved against the dozer car, as complained of by him in his complaint.

If you find from a preponderance of the evidence that plaintiff was thrown down from the dozer car by an ordinary jar or jolt resulting from the usual and ordinary coupling of the cars together under the circumstances as shown by the evidence in this case, your verdict will be for the defendant.

Given.

W. W. WOODS, *Judge.*

## Instruction Eleven "A."

The fact, if it be a fact, that the speed of the train, in making the coupling to the dozer car, was excessive and unreasonable, did not relieve the plaintiff from the exercise of due care. He could not negligently shut his eyes against the oncoming train and say he did not see it coming, or say that he thought it was being moved at the ordinary and usual rate of speed. Plaintiff's reason for his inattention to his own safety, did not warrant him in turning his attention away from the train moving at an unknown speed at a short distance without looking to see where the train was and how fast it was coming. It was his duty to look and listen and pay attention to his situation, and if the evidence shows that he failed in this respect, he was negligent.

Given.

W. W. WOODS, *Judge*.

## Instruction Fifteen "A."

The evidence which you have heard in this case as to the probable duration of the life of the plaintiff, based upon the mortality tables of the insurance companies, is not conclusive upon the question of the duration of plaintiff's life. Such tables are submitted  
36 to you, not to control you but merely to guide you. They are based upon averages and there is no certainty that any person will live the average duration of life laid down by these tables; they are, at best, probabilities, and man's expectancy of life may vary with his employment or his physical condition. No one can tell how long a person is going to live, but you can approximate it or average it.

Given.

W. W. WOODS, *Judge*.

## Instruction Sixteen "A."

If the jury find from the evidence that the plaintiff at the time of his alleged injury was not engaged in interstate commerce, as hereinbefore explained to you, your verdict should be for the defendant.

Given.

W. W. WOODS, *Judge*.

## No. Seventeen "A."

Plaintiff in his complaint conceded that, if the said dirt train was being moved at the time of the coupling, at a speed of four miles or less per hour, the defendant Railway Company was not negligent. Therefore, before you can find the Railway Company negligent on

the speed of said train, the evidence must show said train was running, at said time, at a speed in excess of four miles per hour.

Given.

W. W. WOODS, *Judge.*

Filed November 4th, 1916.

(Title of Court and Cause.)

*Notice of Appeal.*

To L. R. Adams, Clerk of the District Court of the First Judicial District of the State of Idaho in and for the County of Shoshone: William Kinzell, the above-named plaintiff, and to John P. Gray, W. D. Keeton, W. F. McNaughton and James Wayne, attorneys for plaintiff:

You and each of you are hereby notified that the defendant in the above entitled action hereby appeals to the Supreme Court of the State of Idaho, from the Judgment made, given, rendered and entered herein on the 4th day of November, 1916, in favor of the plaintiff and against the defendant, and filed, entered and recorded in said Court on the 4th day of November, 1916, in Book "E" of Judgment Records, at page 480 thereof.

This appeal is taken from the whole of said Judgment on questions of both law and fact.

GEO. W. KORTE,

*Residence and P. O. Address: Seattle, Washington;*

ROBT. H. ELDER,

*Residence and P. O. Address: Coeur d'Alene, Idaho,  
Attorneys for Defendant.*

37 Due service of the above and foregoing Notice of Appeal is hereby admitted and acknowledged this 31st day of January, A. D. 1917.

JOHN P. GRAY,

W. D. KEETON,

W. F. McNAUGHTON,

JAMES A. WAYNE,

*Attorneys for Plaintiff.*

Filed Jan. 31, 1917.

(Title of Court and Cause.)

*Acknowledgement of Service.*

The undersigned, attorneys for the plaintiff, William Kinzell, do hereby acknowledge receipt of a true and correct copy of the Notice of Appeal on the part of the defendant, to the Supreme Court of the State of Idaho, from the Judgment entered in the above entitled cause, in favor of the plaintiff and against the de-

fendant upon the verdict of the jury returned in said cause, a copy of which notice of appeal this day received, is attached hereto.

Dated this 31st day of January, A. D. 1917.

JOHN P. GRAY,  
WM. D. KEETON,  
W. F. McNAUGHTON,  
JAS. WAYNE,

*Attorneys for Plaintiff.*

In the District Court of the First Judicial District of the State of Idaho in and for the County of Shoshone.

WILLIAM KINZELL, Plaintiff,

vs.

THE CHICAGO, MILWAUKEE & ST. PAUL RAILWAY CO., Defendant.

*Notice of Appeal.*

To L. R. Adams, Clerk of the District Court of the First Judicial District of the State of Idaho in and for the County of Shoshone; William Kinzell, the above named Plaintiff, and to John P. Gray, W. D. Keeton, W. F. McNaughton, and James Wayne, attorneys for plaintiff:

You and each of you are hereby notified that the defendant in the above entitled action hereby appeals to the Supreme Court of the State of Idaho, from the Judgment made, given, rendered and entered herein on the 4th day of November, 1916, in favor of the plaintiff and against the defendant, and filed, entered and recorded in said Court on the 4th day of November, 1916, in Book — of Judgment Records, at page — thereof.

This appeal is taken from the whole of said Judgment on questions of both law and fact.

38

GEO. W. KORTE,

*Residence and P. O. Address: Seattle, Washington;*

ROBT. H. ELDER,

*Residence and P. O. Address: Coeur d'Alene, Idaho,*

*Attorneys for Defendant.*

Filed Jan. 31, 1917.

(Title of Court and Cause.)

*Undertaking on Appeal.*

Know all men by these presents, That, whereas, the Chicago, Milwaukee and St. Paul Railway Co., the defendant in the above entitled action desired to appeal to the Supreme Court of the State of Idaho, from the Judgment rendered against it in the above entitled action, in the District Court on the 4th day of November, 1916, and entered and recorded in Book E of Judgments on page

480, on the 4th day of November, 1916, rendering Judgment in favor of the plaintiff, William Kinzell, and against the defendant, the Chicago, Milwaukee & St. Paul Railway Co., for the sum of \$35,000 and costs in the sum of \$151.75, and from the whole of said Judgment.

Now, therefore: In consideration of the premises, and of said appeal from the Judgment so made, rendered and entered on the 4th day of November, 1916, we, the undersigned, the Chicago, Milwaukee & St. Paul Railway Co., a- principal, and the National Surety Company of New York, a corporation, duly authorized to do business as a surety and guaranty company, in Idaho, as surety, hereby jointly and severally undertake and promise on the part of said defendant and appellant, that said defendant and appellant will pay to the said plaintiff and respondent, his heirs, administrators and assigns herein, the damage and costs which may be awarded against the defendant and appellant on the appeal or on a dismissal thereof in the sum not exceeding \$300.00, in which amount we acknowledge ourselves jointly and severally bound by these presents.

In witness whereof: The said Chicago, Milwaukee & St. Paul Railway Co., by its duly authorized officers, as principal, and the said surety, by its duly authorized officers, have hereunto affixed their hands and seals the 26th day of January, A. D. 1917.

THE CHICAGO, MILWAUKEE & ST. PAUL  
RAILWAY COMPANY, *Principal,*

By H. B. EARLING,

[CORPORATE SEAL.] *Its Vice-President.*

NATIONAL SURETY COMPANY, *Surety,*

By (Name illegible),

*Its Attorney in Fact.*

Attest:

— — —

Filed Jan. 31, 1917.

39

(Title of Court and Cause.)

*Certificate to Filing Undertaking on Appeal.*

STATE OF IDAHO,

*County of Shoshone, ss:*

I, L. R. Adams, Clerk of the District Court of the First Judicial District of the State of Idaho, in and for the County of Shoshone, do hereby certify that an Undertaking on Appeal, in due and legal form was properly filed in the above entitled action, in my office on the 31st day of January, 1917, by the defendant in said action.

In witness whereof, I have hereunto set my hand and affixed my official seal this 31st day of January, A. D. 1917.

[Seal of the District Court.]

L. R. ADAMS,  
Clerk of the District Court,  
By C. J. CALLAHAN, Deputy.

Filed Jan. 31, 1917.

(Title of Court and Cause.)

*Præcipe.*

To L. R. Adams, Clerk of the above entitled Court:

You are hereby requested to prepare and furnish an original transcript and four carbon typewritten copies of the following papers constituting the files and records of the above entitled cause, for the purpose of appeal of the above entitled cause to the Supreme Court of Idaho from the Judgment made and entered on the 4th day of November, 1916, to-wit:

Complaint,

Defendant's Demurrer to Complaint,

Order Overruling Demurrer,

Order on Defendant's Motion to Strike,

Defendant's Motion to Require Plaintiff to Elect.

Plaintiff's Election thereon.

Defendant's Answer to Complaint.

Reporter's Transcript of the evidence as and when settled by the Court.

Judge's Certificate settling Reporter's Transcript.

Instructions given by the Court as requested by plaintiff.

Instructions given by the Court as requested by defendant.

Instructions requested by defendant and refused by the Court.

Verdict of the Jury.

Special Interrogatories submitted to and answered by the Jury.

Judgment on the Verdict.

Notice of Appeal from the Judgment.

Acknowledgement of Service of Notice of Appeal and date of filing.

40 Undertaking on Appeal from the Judgment and date of filing.

Clerk's Certificate to filing undertaking.

Judgment Roll.

Defendant's Præcipe for papers to be included in the Record on Appeal.

Clerk's Certificate to the papers included in the Record on Appeal.

GEO. W. KORTE,

*Residence and P. O. Address: Seattle, Wn.;*

ROBT. H. ELDER,

*Residence and P. O. Address: Cœur d'Alene, Idaho,*

*Attorneys for Defendant.*

Filed Jan. 31, 1917.



(Title of Court and Cause.)

*Notice of Motion for a New Trial.*

To William Kinzell, Plaintiff, and John P. Gray and W. D. Keeton,  
Attorneys for Plaintiff:

You and each of you will please take notice that the Chicago, Milwaukee & St. Paul Railway Company, a corporation, the above named defendant, intends and will move the above entitled court to vacate and set aside the verdict of the jury rendered and entered herein, and also to vacate and set aside the judgment of the court rendered and entered and recorded upon said verdict in the above entitled action, and to grant the defendant a new trial of said action on the following grounds:

1. Misconduct of the jury.
  2. Newly discovered evidence material for said defendant which it could not with reasonable diligence have discovered and produced at the trial.
  3. Accident and surprise which ordinary prudence could not have guarded against.
  4. Insufficiency of the evidence to justify the verdict.
  5. Errors in law occurring at the trial and excepted to by the defendant.
  6. Excessive damages appearing to have been given under the influence of passion and prejudice of the jury.
  7. Irregularity in the proceedings of the plaintiff and plaintiff's counsel by which the defendant was prevented from having a fair trial.
  8. Orders of the court and abuse of discretion of the court through which the defendant was prevented from having a fair trial.
  9. Irregularity in the proceedings of the court by which the defendant was prevented from having a fair trial.
- 41      The defendant hereby specifies the following particulars in which the evidence is insufficient to support or justify the verdict:

1. That there is no evidence tending to show negligence on the part of the defendant.
2. That there is no evidence that the plaintiff at the time that he met with his injury was engaged in interstate commerce, or performing a service in said commerce, or that the particular work which the defendant was carrying on at the time the plaintiff met with his injury was work connected with or a part of interstate commerce.
3. The evidence not only preponderates in favor of the defendant, but is without dispute that plaintiff at the time he met with his alleged injury was engaged in work wholly disconnected from interstate commerce, to wit, doing the work of original construction, and not work connected with the repair or maintenance of an instrument then in use in interstate commerce.

4. The evidence largely preponderates in favor of the defendant, and is without dispute that the cause of the plaintiff's injury was due wholly to a risk which he assumed, and a risk which by the use of his senses, he knew or could have known and appreciated, and avoided the resulting injury therefrom.

5. The evidence is conclusive and preponderating in favor of the defendant that the speed of the train at the time it coupled to the dozer car, and the primary negligence charged against the defendant, was not greater than four miles an hour, and it is admitted in the plaintiff's complaint and by counsel in open court at the trial, that a speed of four miles an hour or less was not excessive or negligent in making the coupling to the dozer car complained of.

6. There was no evidence tending to show that a tail air hose was necessary or ordinarily or customarily used on work trains by well regulated railroads, or was customarily or ordinarily used by this road, or that if it had been used, the accident to the plaintiff could have been avoided, and further, that the evidence does show that a tail air hose was not customarily or ordinarily used by well regulated railroads, and was not used by this railroad, and that under the particular circumstances at the time in question, could not have been made use of to avoid the accident.

7. That there is no evidence showing or tending to show that the speed of the train was in excess of four miles per hour.

8. The evidence proves beyond a preponderance that the cause of plaintiff's injury and damages was solely due to his own negligence, without any act or fault on the part of the defendant contributing thereto.

#### 42 *Specifications of Errors.*

The defendant relies upon the following particular errors in law occurring at the trial and excepted to by the defendant, and upon which it will rely among other things, on its motion for a new trial herein, and upon appeal, if appeal be had:

##### 1.

The court erred in making and entering an order in favor of the plaintiff and against the defendant, and overruling defendant's demurrer to plaintiff's complaint.

##### 2.

The court erred in making and entering an order in favor of the plaintiff and against the defendant, and overruling and denying defendant's motion to strike certain portions of plaintiff's complaint.

## 3.

The court erred in overruling the defendant's objections to questions propounded by the plaintiff to the witness William Kinzell, testifying in his own behalf, as is more fully shown by the minutes of the court and the reporter's notes, to which reference is hereby made for further particulars.

## 4.

The court erred in permitting the witness, Dr. John Marshall to testify over the objection of the defendant that the plaintiff might be suffering from an impacted fracture of the thigh or hip joints, and that his injury complained of with respect to his hip, might be due to such a source.

## 5.

The court erred in overruling objections made by the defendant to evidence submitted on behalf of the plaintiff.

## 6.

The court erred in sustaining the objection of the plaintiff to the questions propounded Dr. O. D. Platt by the defendant on cross examination, relative to the injury or condition of the plaintiff, based upon a subsequent examination which was made by Dr. Platt.

## 7.

The court erred in sustaining objections made by the plaintiff to questions propounded to defendant's witnesses.

## 8.

The court erred in permitting the witness Kinzell to testify over the objections of the defendant that the witness for the defendant, Mike McGraw, had at one time been working under him, that  
43 he had discharged him for drunkenness, and that the said Mike McGraw bore toward the plaintiff an ill feeling and prejudice.

## 9.

The court erred in making the following comment in the presence of the jury at the time the defendant objected to the questions propounded to the witness Kinzell, relating to the bias and prejudice of the witness Mike McGraw toward him, as follows, to wit: That it was immaterial whether the plaintiff (then on the stand) testifies relating to the bias and prejudice of the witness McGraw, because

"it was plain that McGraw had a feeling of bias against Mr. Kinzell when he testified," to which remarks the defendant then and there excepted, and its exception was allowed.

## 10.

The court erred in denying defendant's motion and application to strike and withdraw from the consideration of the jury, all evidence and issue relating to the failure of the defendant to have upon the dirt train in question, an appliance called a tail air hose.

## 11.

The court erred in denying the defendant's motion to withdraw from the consideration of the jury all evidence and issue relating to the charge in the complaint that defendant after discovering the plaintiff's peril could have avoided injuring him, or what is known as the doctrine of last clear chance.

## 12.

The court erred in denying defendant's motion and application for a non-suit after all plaintiff's evidence had been submitted, upon each and every ground designated in said motion.

## 13.

The court erred in permitting the plaintiff, over the objections of the defendant, to be stripped of his clothing and his bare person exhibited to the jury in the manner as shown by the minutes of this court.

## 14.

The court erred in denying the defendant's motion made at the close of all the testimony and after the plaintiff and the defendant had rested, to withdraw from the consideration of the jury all evidence and issue relating to the failure of the defendant to have upon the dirt train in question, an appliance called a tail air hose, for the reason there was no casual connection between the said act charged and the plaintiff's injury and damage, or that it was  
44 usual or customary to have such an appliance upon a work train operating under the conditions involved in this case.

## 15.

The court erred in denying the defendant's motion made at the close of all the evidence and after the plaintiff and the defendant had rested, that the jury returned a verdict in favor of the defendant upon each and every one of the grounds specified in said motion.

16.

The court erred in making and entering a judgment in favor of the plaintiff and against the defendant.

17.

The court erred in giving instruction No. 1 requested by the plaintiff, which said instruction is as follows:

You are instructed that negligence is the failure to do what reasonable and prudent persons would ordinarily have done under the circumstances of the situation, or doing what reasonable and prudent persons under the existing circumstances would not have done.

18.

The court erred in giving Instruction No. 2 requested by the plaintiff, which said instruction is as follows:

You fix the standard for reasonable, prudent and cautious men under the circumstances of the case as you find them according to your judgment and experience of what that class of men do under the circumstances, and then test the conduct involved and try it by that standard, and neither the judge who tries the case, nor any other person, can supply you with the criterion of judgment by any opinion he may have on that subject.

19.

The court erred in giving Instruction No. 3, requested by the plaintiff, which said instruction is as follows:

The jury is instructed that in this case the burden of proof is upon the plaintiff to establish the negligence of the defendant company and this the plaintiff must do by a preponderance of the evidence. The preponderance of the evidence means the greater weight of the evidence—it does not depend upon the number of witnesses and it does not mean the greater number of witnesses.

20.

The court erred in giving Instruction No. 4, requested by the plaintiff, which said instruction is as follows:

You are instructed that if you find from all of the evidence of the case that the brakeman Moody and the engineer and other  
45 employees on the train at the time of the happening of the accident and injury to the plaintiff in this action were employed by the defendant company as such employees upon the train at the time in question I charge you that the defendant company is bound by the acts of each of such employees within the scope of his employment and authority by the defendant and the defendant is responsible for any act or acts of negligence of such employees and

if either or any of such employees was guilty of any negligent action or conduct as such employee in the discharge of his duty and employment at the time of the accident the defendant is responsible therefor and the employee's negligence in respect to the discharge of his duties as such employee of the defendant company upon the said train in question, if any, was the negligence of the defendant.

## 21.

The court erred in giving Instruction No. 5 requested by the plaintiff, which said instruction is as follows:

You are further instructed that the defendant in this case has interposed the defense that the plaintiff was guilty of contributory negligence—the burden of proof is upon the defendant to establish contributory negligence by a preponderance of the evidence. This may be shown by the evidence adduced on behalf of the plaintiff as well as by evidence introduced by the defendant. Contributory negligence on the part of the defendant is the failure to do what reasonable and prudent persons would ordinarily have done under the circumstances of the situation, or doing what reasonable and prudent persons under the existing circumstances would not have done. You are instructed that if under all the facts and circumstances of the case by a preponderance of the testimony you find that the plaintiff was engaged in interstate commerce and was injured as a result of the negligence of the defendant the fact that the plaintiff was guilty of contributory negligence is not a complete defense or bar to his right to recover damages in the case, but the jury should in such case diminish the damages in proportion to the amount of negligence attributable to the plaintiff and as hereinafter instructed.

## 22.

The court erred in giving Instruction No. 6, requested by the plaintiff, which said instruction is as follows:

If, under all of the evidence in this case and by a fair preponderance thereof, you find that the plaintiff is entitled to recover in this action, you will then proceed to consider the amount of the damages to be awarded to him in your verdict. The plaintiff if  
46 entitled to recover, is entitled to a fair and reasonable compensation in money for the actual loss which he has sustained on account of the loss of the use of his limbs as shown by the facts in this case and in arriving at the amount of his compensation or compensatory damages you have a right to take into consideration the plaintiff's age, occupation, intelligence and qualification shown by the evidence and his earning capacity and in this connection you have a right to take into consideration the wages or salary which he was earning at and a short time prior to the happening of the accident and injury and you may also take into consideration any pain or suffering which he may have undergone or suffered, loss of time, diminution of earning capacity, discomfort and general physical disability so far as the

same may have affected his ability to walk, run or more about in the usual and ordinary way and all other facts and circumstances shown by the evidence or properly deducible from the evidence in the case and to award to him such sum and such sum only as in your sound judgment and opinion will fairly and reasonably compensate him in money for the injuries sustained by him and in no event, however, to exceed the sum of \$50,000.00. You must likewise take into consideration any contributory negligence of the plaintiff if any you find.

## 23.

The court erred in giving Instruction No. 7 requested by the plaintiff, which said instruction is as follows:

You are the exclusive judges of the credibility of the witnesses and of the weight to be given to the testimony of each witness. You may take into consideration the interest, bias or prejudice of any witness, if such interest, bias or prejudice exists, the probability or improbability of the testimony, and any and all other facts and circumstances in evidence which in your judgment would add to or detract from the credibility of the witnesses or the weight of their testimony. If there is a conflict in the testimony you must reconcile it, if you can. If not, you may believe or disbelieve any witness or witnesses, according as you may or may not think them entitled to credit. If you believe that a witness has knowingly testified falsely as to any material matter you are at liberty to disregard the entire testimony of such witness, except insofar as he may be corroborated by other credible evidence.

## 24.

The court erred in giving Instruction No. 8, requested by the plaintiff, which said instruction is as follows:

In this case if the entire jury is not able to agree, a verdict may be rendered by a number of the jury less than twelve, but not  
47 less than nine. If all agree the verdict must be signed by the foreman selected by you. If less than your whole number agree, the verdict must be signed by all who agree.

## 25.

The court erred in giving Instruction No. 9 requested by the plaintiff, which said instruction is as follows:

The jury are instructed that if the plaintiff was upon the dozer in the discharge of his duty and that that was the proper place for him to be at the time of the accident in question that then the defendant owed to the plaintiff the duty not to propel its train over the track at such a high and excessive rate of speed as to strike the train so forcibly as to be dangerous to the safety of the said plaintiff so upon the dozer so that if you shall find from the evidence that the plaintiff was upon the dozer in the performance of his duties and that the defendant negligently propelled or pushed its train of cars against the



said dozer with unreasonable force and at such speed as to obviously place the plaintiff in danger or injury and that thereby by such force and speed the plaintiff was jarred,—and thrown from the train as a result of such unusual and unreasonable bump if any then you are instructed that the defendant would be guilty of negligence.

## 26.

The court erred in giving Instruction No. 10 requested by the plaintiff, which said instruction is as follows:

The jury is instructed that it is for you to say that under all the circumstances of the case the *plaintiff* operated its train in a prudent and careful manner, or whether its train was operated in such an unreasonable, negligent and imprudent manner as to charge it with negligence as herein defined. You are instructed that if it was the duty of the defendant to make an easy coupling and not to strike the dozer at an unreasonable speed or with unreasonable force taking into consideration the surroundings and if you find it was negligent for the defendant to make the coupling and strike the dozer as it did strike it on the occasion in question then the risk of such negligence, if such you find, was not assumed by the plaintiff and the defendant would be responsible therefor.

## 27.

The court erred in giving Instruction No. 11 requested by the plaintiff, which said instruction is as follows:

You are further instructed that if the plaintiff was in the performance of his duties at the time of his accident and was engrossed therein as claimed by him and that the train of cars approached the said dozer and ran into and bumped the same at such unusual and excessive speed and with such great and unusual force as to jar and knock the plaintiff from said dozer and between the wheels of the dozer and the gravel cars the defendant was guilty of negligence.

## 28.

The court erred in giving Instruction No. 12 requested by the plaintiff, which said instruction is as follows:

You are further instructed that if under the evidence in this case you find that it was usual and customary and reasonable for the defendant to provide what is termed a tail air hose on the rear end of the train and that by the operation thereof the brakeman on the train could by means of said valves stop the train in case of necessity, and if you further find from the evidence that the defendant was negligent and careless in not so equipping its said train and that the presence thereof would have prevented a collision with the dozer with such force as to knock and jar the plaintiff therefrom, then you are instructed that the defendant would be guilty of negligence.

## 29.

The court erred in giving Instruction No. 13 requested by the plaintiff, which said instruction is as follows:

You are further instructed that it is the duty of defendant in operating its said train and cars over the track to use reasonable care to keep a lookout ahead and if said defendant and its employees in charge of the said train by keeping a lookout could have seen the said dozer upon the track and the plaintiff thereon in ample time to have stopped the said train, or to have reduced the speed of the train so as to make an easy coupling, but notwithstanding such facts failed to keep such lookout, or keeping such lookout failed to reduce the speed of the train so that an easy coupling might be made and that by reason thereof struck the train with great and unusual force and violence jarring and knocking the plaintiff off of the said dozer, then the defendant was guilty of negligence.

## 30.

The court erred in giving Instruction No. 14 requested by the plaintiff, which said instruction is as follows:

The jury are further instructed that every common carrier by railroad while engaged in commerce between any of the several states or territories, or between any of the states or territories shall be liable for damages to any person suffering injury while he is employed by such carrier in such commerce where such injury results in whole or in part from the negligence of the officers, agents or employees  
49 of such carrier, or by reason of any defect or insufficiency due to its negligence in its cars, engines, appliances, machinery, track, roadbed, rails, boats, wharves and other equipment. In an action brought against such common carrier by railroad to recover damages for personal injuries to an employee, the fact that the employee may have been guilty of contributory negligence shall not bar a recovery, but the damages shall be diminished by the jury in proportion to the amount of negligence attributable to such employee. In this case it is conceded that the defendant was engaged in interstate commerce at the time of the accident to plaintiff and that its main line track was used in interstate commerce. You are instructed that the plaintiff was engaged as an employee in interstate commerce if the work which he was doing was so closely connected therewith as to be a part of it. Tracks and bridges are as indispensable to interstate commerce by railroad as are engines and cars and sound, economic reasoning units with settled rules of law in demanding that all of these instrumentalities be kept in repair. The work of keeping the roadbed, tracks and bridges in a proper state of repair and upkeep while thus used in interstate commerce is so closely related to such commerce as to be in practice and in legal contemplation a part of it. If you find from the evidence therefore that the instrumentality, to wit, the railroad track line and the railroad bridge where the plaintiff was working had become an instrumentality of such commerce and that the plaintiff was engaged in

the work of maintaining the same in proper condition after they had become such instrumentalities and during their use as such, then it is your duty to find that the plaintiff was engaged in interstate commerce. The true test is, was the work in question a part of the interstate commerce in which the carrier was engaged? In determining this matter you should take into consideration that the statute under which the plaintiff is proceeding proceeds upon the theory that the carrier is charged with the duty of exercising proper care to prevent or correct any defect or insufficiency in its cars, engines, appliances, machinery, track, roadbed, rails, boats, wharves and other equipment used in interstate commerce, so that if you find that the plaintiff was engaged in any work which was being done for the purpose of preventing or correcting any defect or insufficiency and in repairing or keeping in repair or good condition any such instrumentality, railroad track or bridge which had already been devoted to interstate commerce, then you are instructed that the plaintiff was engaged in interstate commerce.

## 31.

The court erred in giving Instruction No. 15 requested by the plaintiff, which said instruction is as follows:

50 The court instructs you that it is a general rule that a servant entering into employment which is hazardous assumes the usual risks of the service and those which are apparent to ordinary observation, and when he accepts or continues in the service with knowledge of the character of the instrumentalities from which injury may be apprehended, he also assumes the hazard incident to the situation. Those not obvious assumed by the employe are such perils as exist after the master has used due care and precaution to guard the former against danger, and the defective condition of the instrumentalities or appliances which, by the exercise of reasonable care of the master may be apprehended and obviated, and from the consequence of which he is relieved from responsibility to the servant by reason of the latter's knowledge of the situation is such as is apparent to his observation, or are not known to the employe.

Where there are two ways of performing the duties of a servant—the one way safe and the other dangerous—it is the duty of the employe to select the safe way if he has an opportunity to do so; and if, in such choice of ways, he voluntarily creates a danger to himself which ordinary prudence, under the circumstances, would have enabled him to avoid, he takes the risk from such choice and has no right in law to recover from the master.

## 32.

The court erred in giving Instruction No. 16 requested by the plaintiff, which said instruction is as follows:

Should your verdict be for the plaintiff you are prohibited from arriving at such verdict by a resort to chance. It is not proper to take the enumeration of the amount each of you should think proper

to give the plaintiff, add the same together, and divide the amount thereof by twelve or any other number, and take the quotient as the amount to be returned as your verdict, as that method would be illegal.

I guard you, therefore, against that method, or any resort to chance. You are to review all the evidence, pay consideration to the arguments of your fellow jurors, and by the exercise of calm, deliberate judgment, in view of all of the facts and circumstances as shown by the evidence, and the law as given to you by the court, say by your verdict what you believe to be the actual right.

## 33.

The court erred in refusing to give Instruction No. One requested by the defendant, which said proposed instruction is as follows:

You are instructed that this action is brought under what is commonly known as the Federal Employers' Liability Act, which  
 51 Act, so far as is necessary for your information in this case, provides, in substance that every common carrier by railroad while engaged in commerce between any of the several states or territories, shall be liable in damages to any person suffering injury while employed by such carrier in such commerce, when such injury results, in whole or in part, from the negligence of any of the officers, agents or employes of such carrier; and it is admitted in this case that unless the plaintiff comes within the provisions of this Act, he has no right of recovery in this action. It is necessary, in order that plaintiff may recover under this Act of Congress, that he shall have been, at the time he received his injury, employed in interstate commerce, and, unless the plaintiff was so employed at the time he received his injury, he cannot recover in this action.

If, after you have fully considered all the evidence in this case, you conclude from a preponderance thereof that, at the time plaintiff was injured, he was generally and regularly engaged with others in connection with a work train operating wholly within the State of Washington, and at said time was assigned to, and in charge of, a dozer, a machine used in connection with said work train, which said work train and dozer were then and there engaged solely in the work of hauling and depositing dirt, earth and gravel used in making a fill or embankment under a bridge, at a point on the line of the railroad of the said defendant within the State of Washington; and if you further find that said fill or embankment was, at said time, incomplete, and in such a state of construction that no rails or ties could be, or were, laid thereon and that the same was not used by the said defendant in transporting any of its cars or trains moving in interstate commerce; and if you further find that said fill or embankment was being constructed as an independent structure and in no manner necessary for the security or betterment of the physical condition of said bridge, and that said bridge was in such physical condition that it was capable of sustaining itself independently of the said fill or embankment and was used independently of the said

fill over which to transport interstate commerce, and that the sole purpose of the making of said fill was, when completed, to lay ties and rails thereon and operate cars and trains thereover in interstate commerce—then I instruct you that the plaintiff, while performing the work in connection with said work train and dozer car at the time he received his injury, would not be engaged in interstate commerce within the meaning of the law and would not be entitled to recover in this action, even if otherwise shown to be so entitled.

And if you should so find, then your labors will be at an end and you will return your verdict for the defendant, for it is essential, in order that plaintiff may recover in this action, that he should  
52 have been employed in and performing a service in interstate commerce at the exact time when he received his said injury.

34.

The court erred in refusing to give Instruction No. Four requested by the defendant, which said proposed instruction is as follows:

You are instructed that the fact that there was no tail air hose or air hose apparatus installed upon, or connected with, the operation of said dirt train, has nothing to do with this case.

Not only was defendant not required to have such apparatus upon said train or cars, but such fact was known to the plaintiff at the time he received his injury, and, knowing such fact, he cannot complain of the want thereof.

35.

The court erred in refusing to give Instruction No. Five requested by the defendant, which said proposed instruction is as follows:

You are instructed that if you find from a preponderance of the evidence that, on account of the position in which plaintiff was standing on the dozer car and his inattention to the movements of the dirt train against the dozer car at the time the coupling was made, plaintiff, notwithstanding the speed of the said train against the said dozer car, would have, in any event, been thrown from said dozer car, as the evidence shows he was thrown—then I instruct you that the speed of that train—notwithstanding the evidence shows it was excessive and unusual—was not the proximate cause of plaintiff's injuries, and he cannot recover herein.

36.

The court erred in refusing to give Instruction No. Six requested by the defendant, which said proposed instruction is as follows:

If you find that the defendant was negligent in the manner in which the train was being moved against the dozer car for the purposes of coupling thereto, then you should pursue your inquiry further and determine whether or not the plaintiff, Mr. Kinzell, assumed the risk of his employment at the time and under the circumstances

under which the accident occurred. Upon this point I advise you as follows:

Assumption of risk—unlike contributory negligence—may be free from any suggestion of negligence on the part of the servant, even though the risks be obvious. The risks may be present notwithstanding the exercise of all reasonable care on his part. Some employments are necessarily fraught with dangers to the workmen, danger that must be, and is, confronted by him in the line of his duty. Such dangers as are normally and necessarily connected with the occupation are presumably taken into account in fixing the rate of wages; and a workman of mature years is taken to assume risks of this sort whether he is actually aware of them or not.

But risks of another sort, not naturally connected with the work, may arise out of the failure of the master to exercise due care in the manner and method of doing the work. These risks the servant assumes the moment he becomes aware of the danger and observes and appreciates the risks of injury therefrom. The servant cannot recover for any injuries resulting from the negligence of the master where the conditions constituting such negligence are known to the servant or are obvious and plainly observable by him and the peril clearly apparent.

Under this last rule of assumption of risk, even though you find that the dirt train was being moved toward and against the dozer car at an excessive and unreasonable rate of speed, still, if the evidence shows that Kinzell, by the exercise of his senses, knew, or ought to have known thereof, and knew and appreciated the danger therefrom, and, though having such knowledge and appreciation, he failed to do that which an ordinarily prudent man would have done under the circumstances—you must then find that he assumed the risk and he cannot recover in this action.

The evidence leaves no doubt that the plaintiff Kinzell had knowledge of the approach of the train and that it would come against the dozer car where he was standing, and the only question upon this branch of the case is whether his experience and intelligence was such as to enable him to appreciate, and that he did appreciate, the danger from the manner in which the said train was being moved against the dozer car. If he did, he took the risk and your verdict will be for the defendant.

37.

The court erred in refusing to give Instruction No. Eight, requested by the defendant, which said proposed instruction is as follows:

You are instructed that it is no part of the master's duty to warn an intelligent and experienced servant not to be careless in the presence of known dangers or not to unnecessarily run the risk of injury from the operation of known physical forces. If it is shown by the evidence that plaintiff knew, or as a reasonable man, under the circumstances, ought to have known and appreciated, from where he



was standing upon the dozer car, that the coupling of the cars together would be likely to cause such a jar or jolt of the dozer car as would throw him down between the cars and injure him, and if the

54 evidence shows that he voluntarily remained in such position upon said dozer car, and if it further shows that the necessities of his work did not require him to do so, and that he could have taken a position of absolute safety upon said dozer car, and that his duties did not prevent him from doing so, then, under the circumstances shown by the evidence, the plaintiff assumed the risk and your verdict will be for the defendant.

When there are two ways of performing the duties of a servant—the one way safe and the other dangerous—it is the duty of the employe to select the safe way if he has opportunity to do so; and if, in such choice of ways, he voluntarily creates a danger to himself which ordinary prudence, under the circumstances, would have enabled him to avoid, he takes the risk from such choice and has no right in law to recover from the master.

## 38.

The court erred in refusing to give Instruction No. Nine, requested by the defendant, which said proposed instruction is as follows:

You are instructed that because the instrumentalities employed by railroads must be powerful, must exercise very great force, must bring into play numerous elements that are dangerous to human life, it is necessary that those who deal with them should themselves exercise proper caution. A man has no right, because a fire is built in his neighborhood, to put his finger or his clothes into it and burn them and then say "I may sue and recover damages." He must take care of himself even as the railroad must take care of its duties and its employes. These obligations are mutual and it is the law, and it is your duty to require it as the law, that, if a man voluntarily puts himself into a dangerous position—does so voluntarily, when there are other safe positions in connection with the discharge of his duty in which he can place himself—he cannot recover of the railroad company for damages for that injury which he has caused solely by his own negligence. That is the law. It is your duty to regard it, and you have no right to say that, because this railroad company is a great and powerful instrumentality, it must pay for the plaintiff's injuries whether or not he was negligent or careless. Whether he was negligent or careless is for you to say, and it does not altogether depend upon the opinion of any one of the witnesses. You are to use the common sense for which you were summoned here as jurors, and, for yourselves, say whether this plaintiff acted carefully in standing on the dozer and doing what he claims he was doing at the time the coupling was being made; whether he exercised prudence when he could have accomplished the same end by watching the movement of the said coupling and so could have avoided being knocked from the said car when the coupling



55 was actually made. And if you believe that he carelessly and without due regard for his own safety, remained upon said dozer car when he could, by the exercise of ordinary care, have watched it and taken a safe position—then he was guilty of negligence which proximately contributed to his injuries.

## 39.

The court erred in refusing to give Instruction No. Twelve, requested by the defendant, which said proposed instruction is as follows:

The defendant has alleged in its answer, and has introduced proof, that plaintiff himself was guilty of negligence which was the direct cause of the injury complained of. Now the plaintiff's negligence, if you find that he was negligent, is defined in the same manner as that of the defendant. If you believe from the evidence that the plaintiff, at the time the said coupling was being made, was doing that which a prudent man would not have done under the circumstances, or, if he failed to do that which an ordinarily prudent man would have done under all the existing circumstances, having in view the probable danger of his receiving the injury while said coupling was being made—then I charge you that he is, with respect thereto, guilty of negligence; and if you find that his act was the proximate cause of his injury and that the act of the trainmen in making this coupling was not the proximate cause of the injury to plaintiff, then it will be your duty to find a verdict for the defendant.

In this connection, if you believe from the evidence that the plaintiff's injury was caused partly by the negligent act, if any, of the trainmen in making the coupling, and partly by the negligent act, if any, of the plaintiff, then it will be your duty to compare the same in accordance with the instructions which I shall give you.

In order to make clear to you what is meant by the comparison of negligence declared by the federal law to be the duty of the jury to make, let me say that your first inquiry should be: Was the defendant guilty of negligence? Your second inquiry should be: Was the plaintiff negligent? Your third inquiry should be: In what degree did the negligence of the plaintiff and the negligence of the defendant contribute to the accident?

Under the federal law it is made your duty to determine what proportion. If the plaintiff's negligence contributed to or caused the accident, to the extent, we will say, of one-third of the entire negligence, then the plaintiff's damages would be reduced by one-third; if to the extent of one-half, then his damages would be reduced by one-half; if to the extent of two-thirds, then his damages would be

56 reduced by two-thirds; and, if his negligence was alone the cause of the accident, then, of course, that would wipe out the damages and your verdict should be in favor of the defendant; if you find that the negligence of the two is equal—that is, that the Railway Company is guilty of negligence and the plaintiff is guilty of equal negligence—you must reduce the damages one-half.

## 40.

The court erred in refusing to give Instruction No. Fourteen, requested by the defendant, which said proposed instruction is as follows:

If you come to that stage of the case in which you are to make up a verdict for the plaintiff, it will be your duty then to determine how much to allow the plaintiff, if anything, for the diminution or decrease, if any he has sustained, of his power to earn in the future what he has been earning in the past. This element of damage is not certain or fixed and is a kind of estimated damage.

To find out what plaintiff was capable of earning, you must find out what he did earn in the past and how much his capacity to do his former work has been lessened, if at all, by reason of his injury; and, having ascertained that, find out how old he is and the number of years he probably will live, considering his age, health and habits, and the fact known to us all that men do change their mode of life; that the average man's physical capacity and earning power naturally decline rapidly after fifty years of age, and that some die sooner than others. No one can tell how long a man is going to live, but you can approximate it or average it. In arriving at the amount, you cannot, in any event, allow plaintiff a lump sum equal to what he would receive during the estimated time of his life's expectancy; that would be too much. You must take into account the earning power of that sum of money. A sum of money now in hand is worth more than a like sum payable in the future, and the future payments which will be derived from said sum through its earning power must be discounted or subtracted from the aggregate amount; otherwise, plaintiff will receive more than his earning capacity would have earned him had he received no injury. Whatever sum you determine should be allowed him for the lessening of his earning capacity, if the evidence shows it has been lessened, it must not exceed the present cash value of the aggregate amount which you estimate that his earning capacity has been impaired.

Of course, if you find that plaintiff can now, or will in the future, earn as much as he has been earning in the past, then his earning capacity has not been impaired or damaged and you will allow him nothing on this element of damage.

## 57

## 41.

The court erred in refusing to give Instruction No. Sixteen, requested by the defendant, which said proposed instruction is as follows:

You are instructed that there is no evidence in this case to warrant a finding that the plaintiff was, at the time of receiving his injury, employed in interstate commerce or performing a service in said commerce. You will, therefore, return a verdict for the defendant.

Said motion for a new trial will be made upon the records and files of the above entitled action, the minutes of the court, reporter's

transcript of the evidence hereinafter to be settled by the judge of the said court, and upon any bill of exceptions hereinafter proposed and settled by the order of this court, specifications of particulars wherein the evidence is insufficient to justify the verdict in said action, and the judgment thereon, more particularly hereinafter specified; specification of errors of law occurring at the trial and excepted to by defendant hereinbefore more particularly set out, and upon the affidavit hereafter to be prepared and filed and served upon you, and upon the judgment roll, and upon the record and files of this cause, and upon each and all thereof.

GEO. W. KORTE,  
ROBT. H. ELDER,  
*Attorneys for Defendant.*

Residence and Post office Address, Cœur d'Alene, Idaho.

Service of the foregoing Notice of Intention to Move for a New Trial is hereby admitted by the receipt of a true and correct copy thereof at C. D. A., in the county of Kootenai, State of Idaho, this 10th day of November, 1916.

W. F. McNAUGHTON,  
JOHN P. GRAY,  
*Attorneys for Plaintiff.*

Residence and Post Office Address, Cœur d'Alene, Idaho.

Filed Nov. 13, 1916.

(Title of Court and Cause.)

*Motion for New Trial.*

Comes now the Chicago, Milwaukee & St. Paul Railway Company, a corporation, the defendant in the above entitled cause, and, within the time allowed by law and by order of this court, and moves the above entitled court to set aside and vacate the verdict rendered and entered herein and to set aside the decision and the judgment entered on said verdict in the above entitled cause and to grant the defendant a new trial of said action upon the following grounds, to-wit:

58

I.

Misconduct of the jury.

II.

Newly discovered evidence material for said defendant which it could not with reasonable diligence have discovered and produced at the trial.

## III.

Accident and surprise which ordinary prudence could not have guarded against.

## IV.

Insufficiency of the evidence to justify the verdict.

## V.

Errors in law occurring at the trial and excepted to by the defendant.

## VI.

Excessive damages appearing to have been given under the influence of passion and prejudice of the jury.

## VII.

Irregularity in the proceedings of the plaintiff and plaintiff's counsel by which the defendant was prevented from having a fair trial.

## VIII.

Orders of the court and abuse of discretion of the Court through which the defendant was prevented from having a fair trial.

## IX.

Irregularity in the proceedings of the court by which the defendant was prevented from having a fair trial.

*Specifications Wherein the Evidence Is Insufficient to Support or Justify the Verdict.*

## I.

That there is no evidence tending to show negligence on the part of the defendant.

## II.

That there is no evidence that the plaintiff at the time that he met with his injury was engaged in interstate commerce, or performing a service in said commerce, or that the particular work which the

defendant was carrying on at the time the plaintiff met with his injury was work connected with or a part of interstate commerce.

59

## III.

The evidence not only preponderates in favor of the defendant, but is without dispute that plaintiff at the time he met with his alleged injury was engaged in work wholly disconnected from interstate commerce, to-wit, doing the work of original construction, and not work connected with the repair or maintenance of an instrument then in use in interstate commerce.

## IV.

The evidence largely preponderates in favor of the defendant, and is without dispute that the cause of the plaintiff's injury was due wholly to a risk which he assumed, and a risk which by the use of his senses, he knew or should have known and appreciated, and avoided the resulting injury therefrom.

## V.

The evidence is conclusive and preponderating in favor of the defendant that the speed of the train at the time it coupled to the dozer car, and the primary negligence charged against the defendant, was not greater than four miles an hour, and it is admitted in the plaintiff's complaint and by counsel in open court at the trial, that a speed of four miles an hour or less was not excessive or negligent in making the coupling to the dozer car complained of.

## VI.

There was no evidence tending to show that a tail air hose was necessary or ordinarily or customarily used on work trains by well regulated railroads, or was customarily or ordinarily used by this road, or that if it had been used, the accident to the plaintiff could have been avoided, and further, that the evidence does show that a tail air hose was not customarily or ordinarily used by well regulated railroads, and was not used by this railroad, and that under the particular circumstances at the time in question, could not have been made use of to avoid the accident.

## VII.

That there is no evidence showing or tending to show that the speed of the train was in excess of four miles per hour.

## VIII.

The evidence proves beyond a preponderance that the cause of plaintiff's injury and damages was solely due to his own negligence, without any act or fault on the part of the defendant contributing thereto.

60

*Specifications of Errors.*

The defendant relies upon the following particular errors in law occurring at the trial and excepted to by the defendant, and upon which it will rely among other things, on its motion for a new trial herein, and upon appeal, if appeal be had:

## I.

The court erred in making and entering an order in favor of the plaintiff and against the defendant, and overruling defendant's demurrer to plaintiff's complaint.

## II.

The court erred in making and entering an order in favor of the plaintiff and against the defendant, and overruling and denying defendant's motion to strike certain portions of plaintiff's complaint.

## III.

The court erred in overruling the defendant's objections to questions propounded by the plaintiff to the witness William Kinzell testifying in his own behalf, as is more fully shown by the minutes of the court and the reporter's notes, to which reference is hereby made for further particulars.

## IV.

The court erred in permitting the witness, Dr. John Marshall, to testify over the objection of the defendant that the plaintiff might be suffering from an impacted fracture of the thigh or hip joints, and that his injury complained of with respect to his hip, might be due to such a source.

## V.

The court erred in overruling objections made by the defendant to evidence submitted on behalf of the plaintiff.

## VI.

The court erred in sustaining the objection of the plaintiff to the questions propounded Dr. O. D. Platt by the defendant on cross examination, relative to the injury or condition of the plaintiff, based upon a subsequent examination which was made by Dr. Platt.

## VII.

The court erred in sustaining objections made by the plaintiff to questions propounded to defendant's witnesses.

## VIII.

The court erred in permitting the witness Kinzell to testify over the objections of the defendant that the witness for the defendant, Mike McGraw, had at one time been working under him, 61 that he had discharged him for drunkenness, and that the said Mike McGraw bore toward the plaintiff an ill feeling and prejudice.

## IX.

The court erred in making the following comment in the presence of the jury at the time the defendant objected to the questions propounded to the witness Kinzell, relating to the bias and prejudice of the witness Mike McGraw towards him, as follows: to-wit: That it was immaterial whether the plaintiff (then on the stand) testifies relating to the bias and prejudice of the witness McGraw, because "it was plain that McGraw had a feeling of bias against Mr. Kinzell when he testified," to which remarks the defendant then and there excepted, and its exception was allowed.

## X.

The court erred in denying defendant's motion and application to strike and withdraw from the consideration of the jury, all evidence and issue relating to the failure of the defendant to have upon the dirt train in question, an appliance called a tail air hose.

## XI.

The court erred in denying the defendant's motion to withdraw from the consideration of the jury all evidence and issue relating to the charge in the complaint that defendant after discovering the plaintiff's peril could have avoided injuring him, or what is known as the doctrine of last clear chance.



## XII.

The court erred in denying defendant's motion and application for a non-suit after all plaintiff's evidence had been submitted, upon each and every ground designated in said motion.

## XIII.

The court erred in permitting the plaintiff, over the objections of the defendant, to be stripped of his clothing and his bare person exhibited to the jury in the manner as shown by the minutes of this court.

## XIV.

The court erred in denying the defendant's motion made at the close of all the testimony and after the plaintiff and the defendant had rested, to withdraw from the consideration of the jury all evidence and issue relating to the failure of the defendant to have upon the dirt train in question, an appliance called a tail air hose, for the reason there was no *casual* connection between the said act charged and the plaintiff's injury and damage or that it was usual or customary to have such an appliance upon a work train operating under the conditions involved in this case.

## XV.

The court erred in denying the defendant's motion made at the close of all the evidence and after the plaintiff and the defendant had rested, that the jury return a verdict in favor of the defendant upon each and every one of the grounds specified in said motion.

## XVI.

The court erred in making and entering a judgment in favor of the plaintiff and against the defendant.

## XVII.

The court erred in giving Instruction No. 1 requested by the plaintiff, which said instruction is as follows:

You are instructed that negligence is the failure to do what reasonable and prudent persons would ordinarily have done under the circumstances of the situation, or doing what reasonable and prudent persons under the existing circumstances would not have done.

## XVIII.

The court erred in giving Instruction No. 2 requested by the plaintiff, which said instruction is as follows:

You fix the standard for reasonable, prudent and cautious men

under the circumstances of the case as you find them according to your judgment and experience of what that class of men do under these circumstances, and then test the conduct involved and try it by that standard, and neither the judge who tries the case, nor any other person, can supply you with the criterion of judgment by any opinion he may have on that subject.

### XIX.

The court erred in giving Instruction No. 3 requested by the plaintiff, which said instruction is as follows:

The jury is instructed that in this case the burden of proof is upon the plaintiff to establish the negligence of the defendant company and this the plaintiff must do by a preponderance of the evidence. The preponderance of the evidence means the greater weight of the evidence—it does not depend upon the number of witnesses and it does not mean the greater number of witnesses.

### XX.

The court erred in giving Instruction No. 4 requested by the plaintiff, which said instruction is as follows:

You are instructed that if you find from all of the evidence of the case that the brakeman Moody and the engineer and other  
63 employees on the train at the time of the happening of the accident and injury to the plaintiff in this action were employed by the defendant company as such employees upon the train at the time in question I charge you that the defendant company is bound by the acts of each of such employees within the scope of his employment and authority by the defendant and the defendant is responsible for any act or acts of negligence of such employees and if either or any of such employees was guilty of any negligent action or conduct as such employee in the discharge of his duty and employment at the time of the accident the defendant is responsible therefor and the employee's negligence in respect to the discharge of his duties as such employee of the defendant company upon the said train in question, if any, was the negligence of the defendant.

### XXI.

The court erred in giving Instruction No. 5 requested by the plaintiff, which said instruction is as follows:

You are further instructed that the defendant in this case has interposed the defense that the plaintiff was guilty of contributory negligence—the burden of proof is upon the defendant to establish contributory negligence by a preponderance of the evidence. This may be shown by the evidence adduced on behalf of the plaintiff as well as by evidence introduced by the defendant. Contributory negligence on the part of the defendant is the failure to do what reasonable and prudent persons would ordinarily have done under

the circumstances of the situation, or doing what reasonable and prudent persons under the existing circumstances would not have done. You are instructed that if under all the facts and circumstances of the case by a preponderance of the testimony you find that the plaintiff was engaged in interstate commerce and was injured as a result of the negligence of the defendant the fact that the plaintiff was guilty of contributory negligence is not a complete defense or bar to his right to recover damages in the case, but the jury should in such case diminish the damage in proportion to the amount of negligence attributable to the plaintiff and as hereinafter instructed.

## XXII.

The court erred in giving Instruction No. 6 requested by the plaintiff, which said instruction is as follows:

If, under all of the evidence in this case and by a fair preponderance thereof, you find that the plaintiff is entitled to recover in this action, you will then proceed to consider the amount of the damages to be awarded to him in your verdict. The plaintiff if entitled to recover, is entitled to fair and reasonable compensation

in money for the actual loss which he has sustained on account of the loss of the use of his limbs as shown by the facts in this case and in arriving at the amount of his compensation or compensatory damages you have a right to take into consideration the plaintiff's age, occupation, intelligence and qualifications shown by the evidence and his earning capacity and in this connection you have a right to take into consideration the wages or salary which he was earning at and a short time prior to the happening of the accident and injury and you may also take into consideration any pain or suffering which he may have undergone or suffered, loss of time, diminution of earning capacity, discomfort and general physical disability so far as the same may have affected his ability to walk, run or move about in the usual ordinary way and all other facts and circumstances shown by the evidence or properly deducible from the evidence in the case and to award to him such sum and such sum only as in your sound judgment and opinion will fairly and reasonably compensate him in money for the injuries sustained by him and in no event, however, to exceed the sum of \$50,000. You must likewise take into consideration any contributory negligence of the plaintiff if any you find.

## XXIII.

The court erred in giving Instruction No. 7 requested by the plaintiff, which said instruction is as follows:

You are the exclusive judges of the credibility of the witnesses and of the weight to be given to the testimony of each witness. You may take into consideration the interest, bias or prejudice of any witness, if such interest, bias or prejudice exists, the probability or improbability of the testimony, and any and all other facts and circumstances in evidence which in your judgment would add to or detract from the credibility of the witnesses or the weight

of their testimony. If there is a conflict in the testimony you must reconcile it, if you can. If not, you may believe or disbelieve any witness or witnesses, according as you may or may not think them entitled to credit. If you believe that a witness has knowingly testified falsely as to any material matter you are at liberty to disregard the entire testimony of such witness, except insofar as he may be corroborated by other credible evidence.

#### XXIV.

The court erred in giving Instruction No. 8 requested by the plaintiff, which said instruction is as follows:

In this case if the entire jury is not able to agree, a verdict may be rendered by a number of the jury less than twelve but not less than nine. If all agree the verdict must be signed by the foreman selected by you. If less than your whole number agree, the verdict must be signed by all who agree.

#### XXV.

The court erred in giving Instruction No. 9 requested by the plaintiff, which said instruction is as follows:

The jury are instructed that if the plaintiff was upon the dozer in the discharge of his duty and that that was the proper place for him to be at the time of the accident in question that then the defendant owed to the plaintiff the duty not to propel its train over the track at such a high and excessive rate of speed as to strike the train so forcibly as to be dangerous to the safety of the said plaintiff so upon the dozer so that if you shall find from the evidence that the plaintiff was upon the dozer in the performance of his duties and that the defendant negligently propelled or pushed its train of cars against the said dozer with unreasonable force and at such speed as to obviously place plaintiff in danger or injury and that thereby by such force and speed the plaintiff was jarred—and thrown from the train as a result of such unusual and unreasonable bump if any then you are instructed that the defendant would be guilty of negligence.

#### XXVI.

The court erred in giving Instruction No. 10 requested by the plaintiff, which said instruction is as follows:

The jury is instructed that it is for you to say that under all the circumstances of the case the plaintiff operated its train in a prudent and careful manner, or whether its train was operated in such an unreasonable, negligent and imprudent manner as to charge it with negligence as herein defined. You are instructed that if it was the duty of the defendant to make an easy coupling and not to strike the dozer at an unreasonable speed or with unreasonable force taking into consideration the surroundings and if you find it was negligent for the defendant to make the coupling and strike the dozer as it did strike it on the occasion in question then the risk of such negli-

gence, if such you find, was not assumed by the plaintiff and the defendant would be responsible therefor.

### XXVII.

The court erred in giving Instruction No. 11 requested by the plaintiff, which said instruction is as follows:

You are further instructed that if the plaintiff was in the performance of his duties at the time of his accident and was engrossed therein as claimed by him and that the train of cars approached the said dozer and ran into and bumped the same at such unusual and excessive speed and with such great and unusual force as to jar and knock the plaintiff from said dozer and between the wheels of the dozer and the gravel cars defendant was guilty of negligence.

66

### XXVIII.

The court erred in giving Instruction No. 12 requested by the plaintiff, which said instruction is as follows:

You are further instructed that if under the evidence in this case you find that it was usual and customary and reasonable for the defendant to provide what is termed as a tail air hose on the rear end of the train and that by the operation thereof the brakeman on the train could by means of said valves stop the train in case of necessity, and if you further find from the evidence that the defendant was negligent and careless in not so equipping its said train and that the presence thereof would have prevented a collision with the dozer with such force as to knock and jar the plaintiff therefrom, then you are instructed that the defendant would be guilty of negligence.

### XXIX.

The court erred in giving Instruction No. 13 requested by the plaintiff, which said instruction is as follows:

You are further instructed that it is the duty of defendant in operating its said train and cars over the track to use reasonable care to keep a lookout ahead and if said defendant and its employes in charge of said train by keeping a lookout could have seen the said dozer upon the track and the plaintiff thereon in ample time to have stopped the said train, or to have reduced the speed of the train so as to make an easy coupling, but notwithstanding such facts, failed to keep such lookout, or keeping such lookout failed to reduce the speed of the train so that an easy coupling might be made and that by reason thereof struck the train with great and unusual force and violence jarring and knocking the plaintiff off of the said dozer, then the defendant was guilty of negligence.

### XXX.

The court erred in giving Instruction No. 14 requested by the plaintiff, which said instruction is as follows:

The jury are further instructed that every common carrier by railroad while engaged in commerce between any of the several states or territories, or between any of the states or territories shall be liable for damages to any person suffering injury while he is employed by such carrier in such commerce where such injury results in whole or in part from the negligence of the officers, agents or employees of such carrier, or by reason of any defect or insufficiency due to its negligence in its cars, engines, appliances, machinery, track roadbed, rails, boats, wharves and other equipment. In an action brought

67 against such common carrier by railroad to recover damages for personal injuries to an employee, the fact that the employee may have been guilty of contributory negligence shall not bar a recovery, but the damages shall be diminished by the jury in proportion to the amount of negligence attributable to such employee. In this case it is conceded that the defendant was engaged in interstate commerce at the time of the accident to plaintiff and that its main track was used in interstate commerce. You are instructed that the plaintiff was engaged as an employee in interstate commerce if the work which he was doing was so closely connected therewith as to be a part of it. Tracks and bridges are as indispensable to interstate commerce by railroad as are engines and cars and sound, economic reasoning unites with settled rules of law in demanding that all of these instrumentalities be kept in repair. The work of keeping the roadbed, track and bridges in a proper state of repair and upkeep while thus used in interstate commerce is so closely related to such commerce as to be in practice and in legal contemplation a part of it. If you find from the evidence therefore that the instrumentality, to-wit, the railroad track line and the railroad bridge where the plaintiff was working had become an instrumentality in such commerce and that the plaintiff was engaged in the work of maintaining the same in proper condition after they had become such instrumentalities and during their use as such, then it is your duty to find that the plaintiff was engaged in interstate commerce. The true test is, was the work in question a part of the interstate commerce in which the carrier was engaged? In determining this matter you should take into consideration that the statute under which the plaintiff is proceeding proceeds upon the theory that the carrier is charged with the duty of exercising proper care to prevent or correct any defect or insufficiency in its cars, engines, appliances, machinery, track, roadbed, rails, boats, wharves and other equipment used in interstate commerce, so that if you find that the plaintiff was engaged in any work which was being done for the purpose of preventing or correcting any defect or insufficiency and in repairing or keeping in repair or good condition any such instrumentality, railroad track or bridge which had already been devoted to interstate commerce, then you are instructed that the plaintiff was engaged in interstate commerce.

### XXXI.

The court erred in giving Instruction No. 15 requested by the plaintiff, which said instruction is as follows:



The court instructs you that it is a general rule that a servant entering into employment which is hazardous assumes the usual risks of the service and those which are apparent to ordinary observation, and when he accepts or continues in the service with knowledge of the character of the instrumentalities from which injury may be apprehended, he also assumes the hazard incident to the situation. Those not obvious assumed by the employe are such perils as exist after the master has used due care and precaution to guard the former against danger, and the defective condition of the instrumentalities or appliances which, by the exercise of reasonable care of the master may be apprehended and obviated, and from the consequences of which he is relieved from responsibility to the servant by reason of the latter's knowledge of the situation is such as is apparent to his observation, or are not known to the employe.

Where there are two ways of performing the duties of a servant—the one way safe and the other dangerous—it is the duty of the employee to select the safe way if he has an opportunity to do so; and if, in such choice of ways, he voluntarily creates a danger to himself which ordinary prudence, under the circumstances, would have enabled him to avoid, he takes the risk from such choice and has no right in law to recover from the master.

## XXXII.

The court erred in giving Instruction No. 16 requested by the plaintiff, which said instruction is as follows:

Should your verdict be for the plaintiff you are prohibited from arriving at such verdict by a resort to chance. It is not proper to take the enumeration of the amount each of you should think proper to give the plaintiff, add the same together, and divide the amount thereof by twelve or any other number, and take the quotient as the amount to be returned as your verdict, as that method would be illegal.

I guard you, therefore, against that method, or any resort to chance. You are to review all the evidence, pay consideration to the arguments of your fellow jurors, and by the exercise of calm, deliberate judgment, in view of all of the facts and circumstances as shown by the evidence, and the law as given to you by the Court, say by your verdict what you believe to be the actual right.

## XXXIII.

The court erred in refusing to give Instruction No. One requested by the defendant, which said proposed instruction is as follows:

You are instructed that this action is brought under what is commonly known as the Federal Employers' Liability Act, which Act, so far as is necessary for your information in this case, provides, in substance, that every common carrier by railroad while engaged in commerce between any of the several states or territories, shall be liable in damages to any person suffering injury while employed by such carrier in such commerce, when such injury



result, in whole or in part, from the negligence of any of the officers, agents or employes of such carrier; and it is admitted in this case that unless the plaintiff comes within the provisions of this Act, he has no right of recovery in this action. It is necessary, in order that plaintiff may recover under this Act of Congress, that he shall have been, at the time he received his injury, employed in interstate commerce, and, unless the plaintiff was so employed at the time he received his injury, he cannot recover in this action.

If, after you have fully considered all the evidence in this case, you conclude from a preponderance thereof that, at the time plaintiff was injured, he was generally and regularly engaged with others in connection with a work train operating wholly within the State of Washington, and at said time was assigned to, and in charge of, a dozer, a machine used in connection with said work train, which said work train and dozer were then and there engaged solely in the work of hauling and depositing dirt, earth and gravel used in making a fill or embankment under a bridge, at a point on the line of the railroad of the said defendant within the State of Washington; and if you further find that said fill or embankment was, at said time, incomplete, and in such a state of construction that no rails or ties could be, or were, laid thereon and that the same was not used by the said defendant in transporting any of its cars or trains moving in interstate commerce; and if you further find that said fill or embankment was being constructed as an independent structure and in no manner necessary for the security or betterment of the physical condition of said bridge, and that said bridge was in such physical condition that it was capable of sustaining itself independently of the said fill or embankment and was used independently of the said fill over which to transport interstate commerce, and that the sole purpose of the making of said fill was, when completed, to lay ties and rails thereon and operate cars and trains thereover in interstate commerce—then I instruct you that the plaintiff, while performing the work in connection with said work train and dozer car at the time he received his injury, would not be engaged in interstate commerce within the meaning of the law and would not be entitled to recover in this action, even if otherwise shown to be so entitled.

And if you should so find, then your labors will be at an end and you will return your verdict for the defendant, for it is essential, in order that plaintiff may recover in this action, that he should have been employed in and performing a service in interstate commerce at the exact time when he received his said injury.

70

## XXXIV.

The court erred in refusing to give Instruction No. Four requested by the defendant, which said proposed instruction is as follows:

You are instructed that the fact that there was no tail air hose or air hose apparatus installed upon, or connected with, the operation of said dirt train, has nothing to do with this case.

Not only was defendant not required to have such apparatus upon said train or cars, but such fact was known to the plaintiff at the

time he received his injury, and knowing such fact, he cannot complain of the want thereof.

## XXXV.

The court erred in refusing to give Instruction No. Five requested by the defendant, which said proposed instruction is as follows:

You are instructed that if you find from a preponderance of the evidence that, on account of the position in which plaintiff was standing on the dozer car and his inattention to the movements of the dirt train against the dozer car at the time the coupling was made, plaintiff, notwithstanding the speed of the said train against the said dozer car, would have, in any event, been thrown from said dozer car, as the evidence shows he was thrown—then I instruct you that the speed of that train—notwithstanding the evidence shows it was excessive and unusual—was not the proximate cause of plaintiff's injuries, and he cannot recover herein.

## XXXVI.

The court erred in refusing to give Instruction No. Six requested by the defendant, which said proposed instruction is as follows:

If you find that the defendant was negligent in the manner in which the train was being moved against the dozer car for the purposes of coupling thereto, then you should pursue your inquiry further and determine whether or not the plaintiff, Mr. Kinzell, assumed the risk of his employment at the time and under the circumstances under which the accident occurred. Upon this point I advise you as follows:

Assumption of risk—unlike contributory negligence—may be free from any suggestion of negligence on the part of the servant, even though the risks be obvious. The risks may be present notwithstanding the exercise of all reasonable care on his part. Some employments are necessarily fraught with dangers to the workman, danger that must be, and is, confronted by him in the line of his duty. Such dangers as are normally and necessarily connected with the occupation are presumably taken into account in fixing the rate of wages; and a workman of mature years is taken to assume risks of this sort whether he is actually aware of them or not.

But risks of another sort, not naturally connected with the work, may arise out of the failure of the master to exercise due care in the manner and method of doing the work. These risks the servant assumes the moment he becomes aware of the danger and observes and appreciates the risk of injury therefrom. The servant cannot recover for any injuries resulting from the negligence of the master where the conditions constituting such negligence are known to the servant or are obvious and plainly observable by him and the peril clearly apparent.

Under this last rule of assumption of risk, even though you find

that the dirt train was being moved toward and against the dozer car at an excessive and unreasonable rate of speed, still, if the evidence shows that Kinzell, by the exercise of his senses, knew, or ought to have known thereof, and knew and appreciated the danger therefrom, and, though having such knowledge and appreciation, he failed to do that which an ordinarily prudent man would have done under the circumstances, you must then find that he assumed the risk and he cannot recover in this action.

The evidence leaves no doubt that the plaintiff Kinzell had knowledge of the approach of the train and that it would come against the dozer car where he was standing, and the only question upon this branch of the case is whether his experience and intelligence was such as to enable him to appreciate, and that he did appreciate, the danger from the manner in which the said train was being moved against the dozer car. If he did, he took the risk and your verdict will be for the defendant.

### XXXVII.

The court erred in refusing to give Instruction No. Eight requested by the defendant, which said proposed instruction is as follows:

You are instructed that it is no part of the master's duty to warn an intelligent and experienced servant not to be careless in the presence of known dangers or not to unnecessarily run the risk of injury from the operation of known physical forces. If it is shown by the evidence that plaintiff knew, or as a reasonable man, under the circumstances, ought to have known and appreciated, from where he was standing upon the dozer car, that the coupling of the cars together would be likely to cause such a jar or jolt of the dozer car as would throw him down between the cars and injure him, and if the evidence shows that he voluntarily remained in such position upon said dozer car, and if it further shows that the necessities of

72 his work did not require him to do so, and that he could have taken a position of absolute safety upon said dozer car, and that his duties did not prevent him from doing so, then, under the circumstances shown by the evidence, the plaintiff assumed the risk and your verdict will be for the defendant.

When there are two ways of performing the duties of a servant,—the one way safe and the other dangerous—it is the duty of the employe to select the safe way if he has opportunity to do so; and if, in such choice of ways, he voluntarily creates a danger to himself which ordinary prudence, under the circumstances, would have enabled him to avoid, he takes the risk from such choice and has no right in law to recover from the master.

### XXXVIII.

The court erred in refusing to give Instruction No. Nine, requested by the defendant, which said proposed instruction is as follows:

You are instructed that because the instrumentalities employed by railroads must be powerful, must exercise very great force, must bring into play numerous elements that are dangerous to human life, it is necessary that those who deal with them should themselves exercise proper caution. A man has no right, because a fire is built in his neighborhood, to put his finger or his clothes into it and burn them and then say "I may sue and recover damages." He must take care of himself even as the railroad must take care of its duties and its employees. These obligations are mutual and it is the law, and it is your duty to require it as the law, that, if a man voluntarily puts himself into a dangerous position—does *not* voluntarily, when there are other safe positions in connection with the discharge of his duty in which he can place himself—he cannot recover of the railroad company for damages for that injury which he has caused solely by his own negligence. That is the law. It is your duty to regard it, and you have no right to say that, because this railroad company is a great and powerful instrumentality, it must pay for the plaintiff's injuries whether or not he was negligent or careless. Whether he was negligent or careless is for you to say, and it does not altogether depend upon the opinion of any one of the witnesses. You are to use the common sense for which you were summoned here as jurors, and, for yourselves, say whether this plaintiff acted carefully in standing on the dozer and doing what he claims he was doing at the time the coupling was being made; whether he *experienced* prudence when he could have accomplished the same end by watching the movement of the said coupling and so could have avoided being knocked from the said car when the coupling was actually made. And if you believe that he carelessly and without due regard for his own safety, remained upon said dozer car when he could, by the exercise of ordinary care, have watched it and taken a safe position, then he was guilty of negligence which proximately contributed to his injuries.

## XXXIX.

The court erred in refusing to give Instruction No. Twelve, requested by the defendant, which said proposed instruction is as follows:

The defendant has alleged in its answer, and has introduced proof, that plaintiff himself was guilty of negligence which was the direct cause of the injury complained of. Now the plaintiff's negligence, if you find that he was negligent, is defined in the same manner as that of the defendant. If you believe from the evidence that the plaintiff, at the time the said coupling was being made, was doing that which a prudent man would not have done under the circumstances, or, if he failed to do that which an ordinarily prudent man would have done under all the existing circumstances, having in view the probable danger of his receiving the injury while said coupling was being made,—then I charge you that he is, with respect thereto, guilty of negligence; and if you find that his act was the proximate cause of his injury and that the act of the trainmen in

making this coupling was not the proximate cause of the injury to plaintiff, then it will be your duty to find a verdict for the defendant.

In this connection, if you believe from the evidence that the plaintiff's injury was caused partly by the negligent act, if any, of the trainmen in making the coupling, and partly by the negligent act, if any, of the plaintiff, then it will be your duty to compare the same in accordance with the instructions which I shall give you.

In order to make clear to you what is meant by the comparison of negligence declared by the federal law to be the duty of the jury to make, let me say that your first inquiry should be:—Was the defendant guilty of negligence? Your second inquiry should be:—Was the plaintiff negligent? Your third inquiry should be: In what degree did the negligence of the plaintiff and the negligence of the defendant contribute to the accident?

Under the federal law it is made your duty to determine what proportion. If the plaintiff's negligence contributed to or caused the accident, to the extent, we will say, of one-third of the entire negligence, then the plaintiff's damages would be reduced by one-third; if to the extent of one-half, then his damages would be reduced by one-half; if to the extent of two-thirds, then his damages would be reduced by two-thirds; and, if his negligence was alone the

74 cause of the accident, then, of course, that would wipe out the damages and your verdict should be in favor of the defendant; if you find that the negligence of the two is equal—that is, that the Railway Company is guilty of negligence and the plaintiff is guilty of equal negligence—you must reduce the damages one-half.

## XL.

The court erred in refusing to give Instruction No. Fourteen requested by the defendant, which said proposed instruction is as follows:

If you come to that stage of the case in which you are to make up a verdict for the plaintiff, it will be your duty then to determine how much to allow the plaintiff, if anything, for the diminution or decrease, if any he has sustained, of his power to earn in the future what he had been earning in the past. This element of damage is not certain or fixed and is a kind of estimated damage.

To find out what plaintiff was capable of earning, you must find out what he did earn in the past and how much his capacity to do his former work has been lessened, if at all, by reason of his injury; and, having ascertained that, find out how old he is and the number of years he probably will live, considering his age, health and habits, and the fact known to us all that men do change their mode of life; that the average man's physical capacity and earning power naturally decline rapidly after fifty years of age, and that some die sooner than others. No one can tell how long a man is going to live, but you can approximate it or average it. In arriving at the amount, you cannot, in any event, allow plaintiff a lump sum equal to what he would receive during the estimated time of his life's expectancy;

that would be too much. You must take into account the earning power of that sum of money. A sum of money now in hand is worth more than a like sum payable in the future, and the future payments which will be derived from said sum through its earning power must be discounted or subtracted from the aggregate amount; otherwise, plaintiff will receive more than his earning capacity would have earned him had he received no injury. Whatever sum you determine should be allowed him for the lessening of his earning capacity, if the evidence shows it has been lessened, it must not exceed the present cash value of the aggregate amount which you estimate that his earning capacity has been impaired.

Of course, if you find that plaintiff can now, or will in the future, earn as much as he has been earning in the past, then his earning capacity has not been impaired or damaged and you will allow him nothing on this element of damage.

75

## XLI.

The court erred in refusing to give Instruction No. Sixteen requested by the defendant, which said proposed instruction is as follows:

You are instructed that there is no evidence in this case to warrant a finding that the plaintiff was, at the time of receiving his injury, employed in interstate commerce or performing a service in said commerce. You will, therefore, return a verdict for the defendant.

This motion will be made upon the records and files of the above entitled action, the judgment roll, the minutes of the court, the reporter's transcript of the evidence hereinafter to be settled and allowed by the judge of said court, specifications of particulars wherein the evidence is insufficient to justify the verdict in said action and the judgment herein, more particularly hereinbefore specified, specifications of errors of law occurring at the trial and excepted to by the defendant, hereinbefore particularly set out, and upon any bill of exception which may be allowed and settled herein and upon the affidavits to be hereafter served, and upon each and all thereof.

GEO. W. KORTE,

ROBT. H. ELDER,

*Attorneys for Defendant.*

Residence and Postoffice Address, Cœur d'Alene, Idaho.

Service of the foregoing motion for a new trial, by receipt of a true and correct copy thereof, at Cœur d'Alene, Kootenai County, Idaho, this 11th day of November, 1916, is hereby admitted.

W. F. McNAUGHTON,

JOHN P. GRAY,

*Residence and Postoffice Address: Cœur d'Alene, Idaho;*

*Residence and Postoffice Address: St. Maries, Idaho,*

*Attorneys for Plaintiff.*

Filed Nov. 13, 1916.



(Title of Court and Cause.)

*Order Denying Motion for New Trial.*

The motion of the plaintiff for a new trial of the above entitled case came on for hearing before Honorable W. W. Woods, Judge of the District Court of the First Judicial District of the State of Idaho, in and for the County of Shoshone, at Wallace, Idaho, on the 76 8th day of February, 1917, pursuant to an order of this Court, a notice of said hearing having been given to the plaintiff as required by law; the defendant by its attorneys George W. Korte and Robt. H. Elder, appearing in support of said motion and the plaintiff by his attorneys, John P. Gray, James A. Wayne, and W. D. Keeton, appeared and opposed said motion. The Reporter's Transcript of the evidence, heretofore settled and filed, the Judgment roll herein, together with all the records and files in the above entitled action, including the notice of a motion for a new trial, were presented in support of said motion, and after the argument of counsel the cause was submitted to the Court, and the Court being fully advised in the premises finds that said motion should be denied.

It is Hereby Ordered: That defendant's motion for a new trial be and the same is hereby denied, to which ruling of the court defendant by counsel then and there excepted, which exception is hereby allowed.

Dated this 9th day of February, A. D. 1917.

WILLIAM W. WOODS,  
*District Judge.*

Filed Feb. 9, 1917.

(Title of Court and Cause.)

*Certificate of Judge Certifying to Papers Used on Motion for New Trial.*

STATE OF IDAHO,  
*County of Shoshone, ss:*

It is hereby certified, that the following papers, to-wit: all the Pleadings, Minutes of the Court, Reporter's Transcript of the Evidence heretofore prepared and settled, the Notice of Motion and Motion for a New Trial, the Verdict and Judgment, the Instructions of the Court, Instructions offered by defendant and refused by Court, the Judgment Roll, all of which are the records and files of this action, were submitted to the Judge and by him used on the hearing of the Motion of the above named defendant, for a new trial herein, and constituted all of the records, papers and files used or considered by said Judge on said hearing.

Dated this 9th day of February, A. D. 1917.

WILLIAM W. WOODS,  
*District Judge.*

Filed Feb. 9, 1917.



77

(Title of Court and Cause.)

*Notice of Appeal from Order Denying Motion for New Trial.*

To L. R. Adams, Clerk of the District Court of the First Judicial District of the State of Idaho in and for the County of Shoshone, to William Kinzell, the above named plaintiff, and to John P. Gray, James A. Wayne, W. F. McNaughton and W. D. Keeton, attorneys for plaintiff:

You and each of you, will please take notice that the Chicago, Milwaukee & St. Paul Railway Co. defendant in the above entitled action, hereby appeals to the Supreme Court of the State of Idaho from that Certain Order made, and rendered by the Honorable W. W. Woods, of the said Court, on the 9th day of February, 1917, and filed, entered and recorded by the Clerk of said Court on the 9th day of February, 1917, denying and overruling the Motion and Application of the defendant for a new trial herein, said decision being in favor of the plaintiff and against the defendant.

Said appeal is taken from the whole and every part of said order, and upon questions of both law and fact.

GEO. W. KORTE,

*Residence and P. O. Address: Seattle, Wn.;*

ROBT. H. ELDER,

*Residence and P. O. Address: Cœur d'Alene, Idaho,*

*Attorneys for Defendant.*

Due and legal service of the foregoing Notice of Appeal is hereby admitted, this 13th day of February, A. D. 1917.

W. F. McNAUGHTON,

JOHN P. GRAY,

W. D. KEETON,

JAS. A. WAYNE,

*Attorneys for Plaintiff.*

Filed Feb. 15, 1917.

(Title of Court and Cause.)

*Undertaking on Appeal.*

Know all men by these presents: That whereas the defendant in the above entitled action desired to appeal to the Supreme Court of the State of Idaho from an order made and entered in the above entitled cause by the Honorable W. W. Woods, Judge of the District Court of the First Judicial District of the State of Idaho in and for the County of Shoshone, on the 9th day of February, 1917, denying and overruling defendant's motion for a new trial herein, which said order was filed and entered by the Clerk of the said Court on the 9th day of February, 1917.

78 Now, therefore, in consideration of the premises and the said appeal from the order so made rendered and entered on the 9th day of February, 1917, we, the undersigned, Chicago, Milwaukee and St. Paul Railway Co., as principal and The Fidelity and Deposit Company of Maryland, a corporation, duly authorized to do business as a surety and guaranty company in the State of Idaho, as surety, jointly and severally undertake and promise on the part of said defendant and appellant that the said defendant and appellant will pay to the said plaintiff and respondent, its successors and assigns herein, all damages and costs which may be awarded against the defendant and appellant on said appeal or on a dismissal thereof, not to exceed the sum of \$300.00, in which amount we acknowledge ourselves jointly and severally bound by these presents.

In witness whereof, the said Chicago, Milwaukee and St. Paul Railway Co., by its duly authorized officers, as principal and the said surety, has caused this undertaking to be subscribed and its corporate seal affixed thereto by its agent, duly authorized this 13th day of February, A. D. 1917.

THE CHICAGO, MILWAUKEE & ST. PAUL  
RAILWAY COMPANY, *Principal*,  
By ROBT. H. ELDER, *Its Atty.*

[CORPORATE SEAL.]

FIDELITY AND DEPOSIT CO. OF  
MD., *Surety*,  
By ROBT. H. ELDER,  
*Its Attorney in Fact.*

Attest:

C. W. CHAMBERLAIN, *Agent.*

Filed Feb. 15, 1917.

(Title of Court and Cause.)

*Certificate in Re Filing of Undertaking on Appeal.*

STATE OF IDAHO,  
*County of Shoshone, ss:*

I, L. R. Adams, Clerk of the District Court of the First Judicial District of the State of Idaho, in and for the County of Shoshone, do hereby certify that an undertaking on appeal in due and legal form, from the order of the Honorable W. W. Woods, Judge of said Court, overruling and denying the defendant's motion and application for a new trial herein rendered, filed and entered on the 9th day of February, A. D. 1917, was filed in the above entitled cause in my office on the 15th day of February, A. D. 1917, by the defendant in said action.

79 In witness whereof, I have hereunto set my hand and affixed the seal of said District Court this 15th day of February, A. D. 1917.

[Seal of the District Court.]

L. R. ADAMS, *Clerk*,  
By C. J. CALLAHAN, *Deputy*.

Filed Feb. 15, 1917.

(Title of Court and Cause.)

*Stipulation.*

Whereas: The defendant in the above entitled cause has perfected its appeal from the Judgment made and entered herein and has also appealed from the order denying defendant's motion for a new trial.

It is hereby stipulated, by and between the above named parties, through and by their respective attorneys, that the defendant shall not be required to give an undertaking or a supersedeas bond as provided by section 4810 of the Revised Codes of the State of Idaho or by any other statute or law of the State of Idaho, and the plaintiff does hereby waive a supersedeas bond on said appeal, and

It is further stipulated and agreed that said defendant shall be and is hereby given a stay of execution until the final determination of said cause by said Supreme Court.

Dated this 13th day of February, A. D. 1917.

JOHN P. GRAY,  
W. F. McNAUGHTON,  
W. D. KEETON,  
JAMES A. WAYNE,  
*Attorneys for Plaintiff.*  
ROBT. H. ELDER,  
GEO. W. KORTE,  
*Attorneys for Defendant.*

Filed Feb. 15, 1917.

(Title of Court and Cause.)

*Stipulation.*

It is hereby stipulated and agreed: That the Clerk shall include in the Transcript on Appeal from the Judgment, all the additional papers necessary and required for the Record on Appeal from the Order denying the Motion for a New Trial in the above entitled

80 cause, and the Record on Appeal from said Order shall be included in the Record on Appeal from the Judgment.

JAS. A. WAYNE,  
JOHN P. GRAY,  
WM. D. KEETON,  
W. F. McNAUGHTON,  
*Attorneys for Plaintiff.*  
GEO. W. KORTE,  
ROBT. H. ELDER,  
*Attorneys for Defendant.*

Filed Feb. 15, 1917.

(Title of Court and Cause.)

*Præcipe.*

To L. A. Adams, Clerk of the above entitled Court:

You are hereby requested and required, to prepare and furnish an original transcript and four carbon typewritten copies of the papers hereinafter designated, constituting the files and records in the above entitled cause on appeal to the Supreme Court from the order made and entered in the above entitled cause on the 9th day of February, 1917, overruling and denying defendant's motion for a new trial in said cause, to-wit:

Complaint,  
Defendant's Demurrer,  
Defendant's Motion to Strike,  
Order Overruling Demurrer,  
Order Overruling Motion to Strike.  
Defendant's Answer to plaintiff's complaint,  
Reporter's Transcript of the Evidence,  
Judge's Certificate Settling Transcript,  
Instructions given by the Court,  
Instructions requested by defendant and Refused by the Court,  
The Verdict,  
The Judgment,  
The Judgment Roll,  
Defendant's Notice of Intention to move for a new trial,  
Order of Court denying Defendant's Application and Motion for a new trial.  
Judge's Certificate to Papers used on the Hearing for Motion for a new trial,  
Notice of Appeal from the Order denying defendant's Motion for a new trial,  
Clerk's Certificate to filing Undertaking on Appeal,  
The Undertaking on Appeal,  
Stipulation waiving Supersedeas Bond.

81 Stipulation between parties agreeing that the Record on appeal from Judgment and Appeal from the Order denying motion for a New Trial may be consolidated,

Defendant's Præcipe for papers to be included on the Record on Appeal,

Defendant's Motion for New Trial,

Clerk's Certificate to the papers included in the Record on Appeal.

Dated this 13th day of February, A. D. 1917.

GEORGE W. KORTE,

ROBT. H. ELDER,

*Attorneys for Defendant.*

Filed Feb. 15, 1917.

*Certificate to Clerk's Transcript.*

STATE OF IDAHO,

*County of Shoshone, ss:*

I, L. R. Adams, Clerk of the District Court of the First Judicial District of the State of Idaho, in and for the County of Shoshone, do hereby certify the foregoing, comprising pages one to 139, inclusive, to be a full, true and correct transcript (under the provisions of Section 4820-A, Idaho Revised Codes, Chapter 117 of the 1911 Session Laws, p. 375) of the Judgment Roll, consisting of Complaint; Motion to Elect, Motion to Strike and Demurrer; Journal Entry of September 10th, 1915; Answer to Complaint; Special Interrogatories and Answers thereto; Verdict; Judgment, and Certificate to Judgment Roll. Also of Notice of Election; Instructions Refused (Requested by Defendant); Instructions Given (Requested by Plaintiff); Instructions Given (Requested by Defendant); All instructions given by the Court; Notice of Appeal from Judgment; Acknowledgment of Service of Notice of Appeal; Undertaking on Appeal from Judgment; Certificate in Re Filing of Undertaking on Appeal from Judgment; Præcipe for Transcript on Appeal from Judgment; Notice of Motion for a New Trial; Motion for New Trial; Order Denying Motion for New Trial; Certificate of Judge as to Papers Used on Hearing of Motion for new Trial; Notice of Appeal from Order Denying Motion for New Trial; Undertaking on Appeal from Order Denying Motion for New Trial; Certificate in Re Filing of Undertaking on Appeal from Order Denying Motion for New Trial; Stipulation Waiving Supersedeas Bond; Stipulation in Re Record on Appeal; Præcipe for Transcript on Appeal from Order

Denying Motion for New Trial, in the case of William Kinzel vs. Chicago, Milwaukee & St. Paul Railway Company, a corporation, all of which papers are on file in my office in said

action, and in my custody.

In Witness Whereof, I have hereunto set my hand and affixed the seal of said District Court at my office in the City of Wallace, Shoshone County, Idaho, this 2nd day of March, A. D. 1917.

[SEAL.]

L. R. ADAMS,  
*Clerk District Court.*

In the District Court of the First Judicial District of the State of Idaho in and for the County of Shoshone.

No. 3768.

WILLIAM KINZELL, Plaintiff,

VS.

CHICAGO, MILWAUKEE & ST. PAUL RAILWAY COMPANY,  
a Corporation, Defendant.

*Transcript of Testimony.*

Monday, October 30th, A. D. 1916.

At this day this cause came on regularly for trial in open court, before the court, Honorable William W. Woods, Judge presiding, sitting with a jury.

Mr. John P. Gray and Mr. William D. Keeton appearing as counsel for Plaintiff;

Mr. George W. Korte and Mr. Robert H. Elder appearing as counsel for Defendant.

The trial was had upon the issues raised by the complaint and answer; being a claim for damages in the sum of \$50,000.00 for personal injuries to the plaintiff.

Mr. Towles: Mr. Gray is making every effort to get here and it is barely possible he may get here late tonight. Counsel has agreed that the taking of testimony should commence tomorrow afternoon.

Mr. Korte: That was the understanding.

The Court: Yes. We will call a jury this morning so as to let the other jurors go. You can call a jury Mr. Clerk.

Thereupon a jury of twelve men was called and duly empanelled to try the cause. Mr. Gray was not present. Mr. Towles and Mr. Keeton representing the plaintiff.

The Court: It is understood we begin taking testimony after recess, tomorrow afternoon.

Mr. Korte: Yes; that's the understanding.

Thereupon the jury was duly admonished by the Court and excused until two o'clock tomorrow afternoon, to which time this trial was postponed.

Tuesday, October 31st, A. D. 1916.

P. M. Session.

At this time Mr. Gray and Mr. Keeton being present representing the plaintiff; present as before, the jury being all present, being duly polled and all answering, the trial of this cause proceeded as follows:

Mr. Gray: I want to ask leave to amend the complaint in two particulars; with reference to the injuries I want to allege, in paragraph twelve, after the word "control of his bowels" in the twelfth line on the last page of said complaint insert, "and he further suffered a permanent injury to his left hip permanently and seriously interfering with the use of the said left hip and leg."

Mr. Korte: I don't think it is proper. It seems to me the cause has been pending long enough so that he ought to have known what he wanted to allege before this time.

The Court: I shall allow the amendment.

Mr. Gray: Also in paragraph Nine of the complaint, at the end of the seventh line after the words, "this plaintiff was discovered," insert: "or should have been discovered." And then after the words, "said brakeman upon the first car" add, "who saw or should have seen the plaintiff."

Mr. Korte: I make the same objection, it is improper and for the further reason that it is antagonistic to the fore part of the complaint and it is putting in a new issue to that set forth in that complaint.

The Court: I shall allow the amendment. Your exception is allowed.

Mr. Korte: Exception.

Thereupon Mr. Gray made his opening statement of the case to the jury on the part of the plaintiff.

Thereupon, to sustain the issues upon his part the plaintiff produced the following:

WILLIAM KINZELL, the plaintiff, was called and being duly sworn as a witness on his own behalf, testified as follows on examination:

By Mr. Gray:

Q. State your name and age to the jury?

A. William Kinzell. My age is 31.

Q. Where are you residing at present?

A. At St. Maries, Idaho.

Q. Where did you live at the time of this accident?

A. At Lavista, Washington.

Q. What is your profession or occupation or business?



A. I am a locomotive engineer by trade, and I am also a Lidgerwood engineer.

84 Q. What is that? What is a Lidgerwood?

A. That is an engine that is placed on a car similar to a flat car and has a big drum on it and a big cable which runs over the car and pulls a plow over the cars. It is connected so we get steam from the locomotive and the cable runs over this drum, winds on this big drum and pulls the plow with the cable, along the cars and that pushes the gravel off and dumps it on each side.

Q. Where were you working the 16th of February?

A. I was working on the railroad between Lavista and Ewan, Washington; working for the Milwaukee railroad at that time.

Q. How long had you worked—

A. I started there in 1915; worked there since that time up until this time.

Q. In what capacity did you work between those dates?

A. I worked as Lidgerwood engineer and as Dozer operator.

Q. What is a Dozer?

A. A Dozer is a car similar to a flat car and it has wings projecting out on each side and those wings can be placed along beside the car. And when they want to work the gravel or dirt away from the car they put these wings out and there is braces that hold them and that pushes the dirt out each side of the track.

Q. You were injured on the 16th of February?

A. Yes sir, 16th of February, 1916.

Q. What work were you doing at that time?

A. I was on the Dozer at that time.

Q. What wages were you getting?

A. \$2.40 a day.

Q. How long had you been working on the Dozer at that time, approximately?

A. Well, round a month or so.

Q. Prior to that time what were you doing?

A. I was running a job we was hauling dirt out there and I was over the job telling them where to dump the dirt.

Q. Where?

A. On this same bridge where they were hauling dirt.

Q. What wages were you receiving then?

A. \$4.00 a day.

Q. Prior to that what were you doing?

A. I was Lidgerwood engineer for the Chicago, Milwaukee & St. Paul railroad.

Q. That was operating this Lidgerwood engine?

A. Yes sir.

Q. What were you receiving for that?

A. I was receiving round \$4.00 a day.

Q. You said you had been a locomotive engineer?

A. Yes sir.

85 Q. Had you operated a locomotive on the Milwaukee?

A. No not on the Milwaukee.

Q. Where did you operate?

A. On the Great Northern.

Q. Any place else?

A. On the North Bank road, I handled a locomotive there, and the Oregon Trunk.

Q. What wages did you receive as locomotive engineer?

A. From \$150.00 to \$200.00 per month.

Q. That was your work, you were operating one at the time you went to the Milwaukee were you?

A. Yes sir. I applied for a job and the superintendent said—

Mr. Korte: I object to what the superintendent said, as hearsay.  
Sustained.

Q. You say you did apply for a job?

A. Yes sir.

Q. How did it happen you were working for \$2.40 a day on the Dozer here?

A. Well, they cut the shovel out from the easterly direction where they were bringing dirt from and there was not much doing and they asked me to take this job for the winter.

Q. On what line of railroad was it?

A. Chicago, Milwaukee & St. Paul main line.

Q. Running from where to where?

A. Running from Plummer, Idaho, to Marengo, Washington.

Q. During the time you were working there were any trains operated over this line?

A. There was a passenger at this time called 27 and 28 which ran between Plummer, Idaho, and Marengo, Washington; also 64 and 64, time freight; also 73 and 74 time freights; also local freight 93 and 94.

Q. Where did they run?

A. Between Plummer, Idaho, and Marengo, Washington.

Q. Did these trains run beyond Plummer?

A. Yes sir.

Q. How far?

A. As far as I know, through all the States.

Q. Beyond the State of Idaho?

A. Yes sir, way beyond the State of Idaho.

Q. These passenger trains, how often did they run?

A. They ran every day, supposed to.

Q. Both ways?

A. Yes sir.

Q. And the freight trains ran how often?

A. Every day.

86 Q. At the point where you were were trains running?

A. Yes sir.

Q. What trains?

A. The passenger train running from Marengo, Washington, to Plummer, Idaho.

Q. Did you have a time card?

A. Yes sir. I had one in my hip pocket, employes' time table.

(The same was marked for identification, Plaintiff's Exhibit "A.")

Q. Is plaintiff's Exhibit "A" that document?

A. Yes sir, that's the same identical card.

Mr. Gray: I offer this in evidence, Plaintiff's Exhibit "A."

Mr. Korte: I object to it, that is I object to the whole contents going in. If you want to introduce some particular thing——

Mr. Gray: If you will admit that this track up there was used in interstate commerce——

Mr. Korte: I am willing to admit that the track there ran outside of the State of Idaho and outside the State of Washington.

Mr. Gray: What I want to get at is this bridge——

Q. What bridge was it you were working on?

A. EE140.

Q. Where was it situated?

A. In Washington a little ways west of Lavista.

Q. Was that single track?

A. Yes sir.

Mr. Korte: I think we can save you a lot of trouble on that. I will admit that the bridges EE140 and 142, that the track- on those bridges were used by interstate trains of the defendant.

Mr. Gray: And the tracks between Ewan and Lavista?

Mr. Korte: Yes.

The Court: That will save lots of trouble.

Mr. Gray: Were used upon the line extending from Plummer, Idaho, to Marengo, Washington, and were used by the defendant company in interstate commerce?

Mr. Korte: Yes.

Q. Under whom were you working?

A. Mr. Sawyer was superintendent at that time.

Q. Who was superintendent of this work?

A. Mike O'Shannessy, he was superintendent of this work.

Q. Just tell us the character of work you were engaged in on the day of the 16th of February, 1915?

A. We were filling this bridge in. It had been a wooden structure and we were filling it in with dirt and was getting it pretty well filled up towards the top and when we dumped a train load of dirt or gravel it was filled right close to the rails and we had this Dozer up there and used it to throw the dirt out in line of the embankment as we were filling up.

87 Q. What was the condition of the bridge prior to the filling in?

A. It was a wooden structure. There was nothing there but wooden timbers holding the rails up.

Q. Did you have a conversation with any of the officers of the defendant with reference to the repair of that bridge?

A. Yes I did.

Q. Who?

A. With the Road Master.

Q. What was his name?

A. McGee.

Q. What was it?

A. He was Road Master——

Mr. Korte: I object to that as incompetent, not binding upon the defendant; no foundation laid for its introduction.

The Court: I don't see its materiality.

Mr. Gray: Showing the character of the work that was being done there. The Road Master is the man who would know about those things, the proper officer of the defendant company.

Mr. Korte: It would be purely hear say to start with; in the second place McGee, the Road Master, could not bind the defendant. It is not primary proof. It is secondary proof, of what some man told this man; in that respect it is hear say.

The Court: I overrule the objection. I think the Road Master is the proper person in that regard.

Mr. Korte: He is calling for information as to the physical condition which, if the man was here himself he could not give his opinion or conclusion; he is asking for hear say on the part of a man who cannot bind the defendant.

The Court: I am in a little doubt about the materiality of it but I overrule the objection.

Defendant excepts. Exception allowed.

Q. Now then you may state as to what statement he made to you?

A. He told me this bridge had been condemned by the Interstate Commerce — for two years.

Q. State what he said with reference to the necessity of repairs——

Mr. Korte: Defendant moves to strike it out as incompetent and immaterial.

Mr. Gray: No objection.

The Court: Stricken out.

Q. State what he said with reference to its being repaired or otherwise?

A. Ask that question again.

Q. What did he say to you with reference to the necessity of replacing or repairing and improving that structure?

88

A. He said it had to be filled; that the Interstate Commerce Commission had condemned it for two years.

Mr. Korte: I move to strike out the answer for the reason as given, as incompetent and immaterial.

The Court: That part of it which refers to what was said by the Interstate Commerce Commission is stricken out.

Mr. Korte: Is it the rule that I must ask for an exception each time, or will they be allowed?

The Court: They will be allowed.

Q. How long have you been working on the Dozer?

A. About a month.

Q. Had you been working all the time on this particular bridge?

A. No sir we worked on other bridges west of there, 142 and 144.

Q. What had you been doing there?

A. Was doing the same thing there.

Mr. Korte: Immaterial and irrelevant Your Honor.

Mr. Gray: You will find that these gentlemen will try to prove that he was not engaged on an interstate line.

The Court: I think it is fair under the circumstances.

Q. On this date you were working on bridge 140 were you not?

A. 140, yes sir.

Q. How was the work carried on there?

Mr. Korte: I think he has answered that once; repetition.

Mr. Gray: He has not answered that at all.

The Court: I don't remember that he answered that. He described how the Dozer worked; has not described this particular work that day.

A. Why, they were hauling this dirt to this bridge from a westerly direction by two trains and they dumped the dirt and we dozed it and then we cut the Dozer off and they would leave it there.

Q. Leave what there?

A. The Dozer. And when we would get the rock cleaned up and the dirt we would get on the Dozer. Then the train would come up there and would make a careful coupling and couple onto this Dozer and shove it down to the other end of the bridge or where ever we asked them to dump the dirt.

Q. How many men were there working on the dozer?

A. There were two, myself and another man.

Q. What was his name?

A. Hiram Lee.

Q. Who had charge of the Dozer work?

A. I did.

89 Q. What supervision or control if any did you have over the gravel train or the employees working thereon?

A. I had none whatever.

Q. Did they get any advise or instructions from you whatever?

A. No sir, only I just told them where to dump the dirt.

Q. You said something about cleaning up or taking up rocks; what did you mean by that?

A. Why, if there would happen to be rocks roll down or roll so we didn't get them with the Dozer, we would go back through there and clean them up so they would not derail a car or anything.

Q. You say "we." Did you do any of the physical work?

A. Yes sir I did.

Q. You worked did you on the Dozer itself?

A. One was raising and lowering the front part of the wings and the other the rear wings.

Q. How many men were working on the gravel train?

A. There was two brakemen, a conductor, an engineer and fireman.

Mr. Korte: How many brakemen did you say?

A. Two brakemen.

Q. Whose duty was it to make the coupling of the gravel train onto the Dozer?

A. It was the front brakeman.

Q. What that any part of your duties?

A. No sir. That was none of my business.

Q. Did you ever do it?

A. No sir.

Q. How would that be made, this coupling?

A. Why, it would be made with a gradual, slow coupling. They would come up there and if the knuckle happened to be closed they would stop and open the knuckle but if the knuckle would happen to be open they would come up and make a careful coupling.

Q. What was your practice and what had been the custom, when the coupling was made, with reference to where you would be?

A. I would be right in my place, on the Dozer where I was handling the fore part of these wings.

Q. Under whose supervision were those men running the train doing that work?

A. They were under the trainmaster and superintendent.

Q. The same ones you have mentioned, Mike O'Shannessy and Sawyer?

A. Also Mr. Campbell who at that time I think was train master.

90 Q. Were you under Mr. Campbell as well as these other men?

A. Yes sir.

Q. Did you have any advice or information from any of your superiors as to the rate of speed at which this gravel train ran over that bridge?

A. Yes sir.

Q. From whom?

A. Mr. Campbell.

Q. What was that?

A. We were talking about this bridge and he said the orders was not to exceed four miles per hour.

Q. For what not to exceed four miles per hour?

A. All trains, this train and all of them.

Q. How had the train been in the habit of approaching that Dozer and making the coupling?

A. They had approached it carefully making a careful coupling.

O. Approximately at what speed?

A. Well I should say probably about two or three miles an hour or something like that.

Q. Prior to that time had you been in the habit of remaining at your post of duty on the Dozer?

A. Yes sir.

Q. On this particular occasion of your injury, on which end of the bridge was the Dozer?

A. On the west end of this bridge nearly at that time.

Q. About how far from the end?

A. I should judge about a hundred to a hundred and fifty feet from the west end, something like that.

Q. Had you dumped some trains that morning?

A. Yes sir.

Q. What time were you injured?

A. I should judge it was round eleven o'clock.

Q. From the point where the Dozer was and you were working to the point from which the train came, what was the condition of the track as to being straight or otherwise?

A. Why it was up in shape——

Q. No, I mean could you see?

A. Yes sir you could see. It was straight as it could be.

Q. How far?

A. Well for half or three quarters of a mile I should judge.

Q. What was the fact as to the Dozer being in view of approaching trains or not?

A. Why it was in plain view.

Q. For how far?

A. For a quarter to half a mile.

91 Q. Now then did you see the train approaching you before it struck the Dozer?

A. Yes sir, I did.

Q. How far away was it?

A. I should judge about a quarter of a mile.

Q. Just where were you at the time you saw it then?

A. I was on the Dozer.

Q. Did you observe anything unusual about it as far as you noticed at that time?

A. Why no, I didn't.

Q. Then what did you do?

A. Why I was standing on the Dozer and facing in an easterly direction with my right hand on the brace rod that ran up in the corner there, my other hand like this (indicating). I just stood there estimating where I would have them dump the train that was approaching, and I supposed that it would take them quite a while to get up to the Dozer, the same as it had been taking them right along. Just before they got close up there——

Q. What was the next thing that attracted your attention?

A. The next thing that attracted by attention it was them coming and Lee hollering, "Look out!" I glanced over my left shoulder and here they was right on top of us. I just grabbed hold with all my might of this brace rod with my right hand and of this crank shaft with my left and I hadn't more'n got hold before they knocked



me loose and I went in between the wheels of the first car and the Dozer.

Q. What was the character of that bump there?

A. It was of unusual force.

Mr. Korte: I move to strike the answer out as a conclusion, incompetent and not a fact.

Mr. Gray: The jury can determine whether it was a fact or not.

Mr. Korte: I would like a ruling, Your Honor.

The Court: The motion will be denied.

Q. Now how close was the front car that was being pushed toward you, I refer to the first car in front as they were being pushed towards you, when you first observed it?

A. I should judge from four to ten feet, something like that.

Q. It was that near to your train?

A. Yes sir.

Q. Did you observe anybody on the train, any of the employees?

A. I noticed, I got a glance at the brakeman.

Q. Where was he?

A. He was on the car nearest the Dozer.

Q. Which end of the car?

92 A. The further end, further from me.

Q. Did you observe what he was doing?

A. He was giving the emergency stop, which is like that (indicating). Just as fast as he could make his arms go.

Q. What do they call that?

A. It is the emergency stop signal, or washout signal.

Q. Did you see anybody else on the train?

A. No sir I never saw a soul.

Q. Now Mr. Kinzell you say you have had considerable experience acting as a locomotive engineer?

A. I have, close to three years; never looked it up closely.

Q. You are familiar with the use of air brakes and so forth?

A. Yes sir.

Q. If that train was going three or four miles an hour, say four miles an hour, with air on, air brakes, within what distance could it be stopped?

A. It could be stopped within I will say four to ten feet.

Q. What happened to you after the Dozer was struck and you were knocked loose from your hold and had been thrown—

A. I was thrown in between the wheels, fell across the rails, thrown in between the wheels and dragged for a distance, I don't know how far, and the arch bar bolt was run into my buttocks here. (Indicating.) And my body was laying across the rails, the wheel was up against my back and forcing me, crowding me ahead for I don't know how far, and I finally rolled away from the wheel. I don't know how I got away from it.

Q. You say what bolt?

A. Arch bar bolt.

Q. Where are they on the car?

A. They are down through the arch bars on each side of the truck bar.

Q. If the train was going three or four miles an hour, from your experience and your experience as a railroad man, would the bump you would have received have been as severe as the one that was given you at that time?

A. No sir.

Mr. Korte: I object to that—I move the answer be stricken until I can object.

The Court: The answer is stricken out awaiting objection.

Mr. Korte: I object to that question as incompetent, not a question for expert testimony. It is a matter for the jury to decide.

Mr. Gray: He can give his judgment. Had been on this Dozer right along.

The Court: I think it is proper for him to give his judgment.

Q. (Question read.)

93 A. No sir it would not.

Q. Did you prior to the time that Mr. Lee called out to you, hear its noise and turn round and see that the train was so closely approaching the Dozer?

A. Yes I did. I just had time to look over my shoulder——

Q. I say prior to that time had you heard or seen them?

A. No I did not.

Q. At the usual speed they had been in the habit of approaching you would it have been as near you at that time?

A. No sir.

Mr. Korte: I object to that, a conclusion; for the jury to determine, whether he knew from what he did.

Sustained.

Mr. Korte: The answer of course goes out as I understand it. Leave that answer out Mr. Reporter.

Q. Mr. Kinzell from the time you first saw that train as described by you, to the time it struck the Dozer, was it going in the usual or at the usual speed at which it had been prior, judging from the time which elapsed?

Mr. Korte: I object to that, calls for a conclusion of the witness and not a fact.

Overruled.

A. You say what?

Mr. Gray: Question withdrawn.

Q. What is a tail-air-hose?

A. It is a hose that is connected to the trail line hose at the end of the train to use for emergency purposes by means of air. In case of emergency the brakeman could pull the air brake and apply the brake automatically on the whole train.

Q. How long would it take to stop a train going four miles per hour?

A. Well I would judge you could stop her in four to ten feet, going at that rate.

Q. Was there any emergency brake applied on that train prior to the time the Dozer was struck and you were knocked off?

A. No sir.

Mr. Korte: It is a conclusion; says he didn't see it until it was within ten feet of him or four feet.

The Court: I sustain that objection.

Q. Can you tell if a train is a car length away and back of you, if the emergency brake has been applied?

A. Why, you could have heard the brakes screeching up against the wheels if it had been.

Q. Did you hear any such noise at the time it was struck?

A. No sir I did not.

94 Q. Now let's get it clear in the record. What is the fact as to the gravel train being coupled on, was it always coupled on the Dozer car before the Dozer car was pushed back?

A. Yes sir.

Q. Mr. Kinzell between the time you observed this train approaching at this great rate of speed and the time that it struck the Dozer, did you have sufficient time or did sufficient time elapse for you to have gotten off the Dozer?

Mr. Korte: I object to that as calling for a conclusion and not a fact.

Mr. Gray: He can give his judgment.

Overruled.

A. No sir, I did not have time.

Q. How many cars were in the train?

A. About 25 if I remember.

Mr. Korte: This particular train, if he knows.

A. There was about 25.

Q. Same train right along?

A. Yes sir.

Q. Had it been there that day, before; that train?

A. Yes sir.

Q. Do you know what the duty of the front brakeman, the one nearest to you was?

A. Yes sir.

Q. What was his duty?

A. He was on the train and supposed to signal or transfer a signal to the other brakeman and then he would transfer the signal to the engineer, and if there was any emergency occasion he was to apply the air brake, he would apply the air brakes by this tail-air-hose valve by opening it.

Q. You said, as I understood it, when you saw this train you only saw this one man and did not see anybody else?

A. That's all I saw.

Q. Where they were you do not know?

A. I did not know where they were, no.

Q. Mr. Kinzell, based upon your experience as a railroad man and your experience in operating a Dozer engine, state what in your judgment was a reasonable speed in which a train could approach to make a coupling onto the Dozer?

A. I should judge from two to three miles an hour.

Q. Was their speed in excess of that, in your judgment, on this occasion?

A. Yes sir.

Q. From the engine could the engineer see you himself?

A. Yes sir he could.

Mr. Korte: That is a conclusion. He can state where the engineer was and let the jury conclude whether he could see.

95 The Court: I sustain the objection unless you show the engineer was in a position where he could see.

Q. From the engine could the Dozer be seen?

A. Yes sir it could.

Q. Prior to the time the front car struck the Dozer?

A. Yes sir.

Q. Was there any obstruction whatever to prevent any one in the engine looking down and seeing the Dozer?

A. No sir, no obstruction whatever.

Q. How far down the track could one see a man on the Dozer?

O. Oh you could see for three quarters of a mile, for half or three quarters of a mile.

Q. Straight track?

A. Yes sir.

Q. No obstruction?

A. No sir.

Q. Now Mr. Kinzell with reference to the character of the bump that was given at the time you were knocked off, was it usual to strike that Dozer with a force such as that or not?

A. No sir it was not.

Q. Now what was the condition of your health prior to this accident?

A. My health was good.

Q. By that, were you strong or otherwise?

A. Yes, I was strong and healthy and able bodied.

Q. Now following the accident where were you taken?

A. I was taken to the St. Maries hospital.

Q. You said, I believe, that your age was 31?

A. 31.

Q. At the time of the injury what age were you then?

A. Why I was 29 then.

Q. What is the date of your birth, what is your birthday?

A. Fourth of August.

Q. You were 29 then in August, 1914?

A. Yes sir.

Q. Where did you say you were taken?

A. I was taken to the St. Maries hospital at St. Maries, Idaho.

Q. Do you know how you were taken down there?

A. I was taken by a caboose and engine I think.

Q. How long were you there?

A. From the 16th of February to the 27th.

Q. As far as you know just state your condition while there and suffering if any, which you endured and what was done and what occasioned you to leave?

Mr. Korte: I object to the latter part as to "what occasioned you to leave," as immaterial and irrelevant under the issues in this case.

96 The Court: Well, leave that out. I will rule upon that as a separate question.

Q. State what suffering you endured and whether any operations were performed upon you there?

Mr. Korte: I only objected to the last part of that question. That relates to something else.

Mr. Gray: I don't understand it so.

A. I suffered with an injured shoulder, broken shoulder blade; suffered from bruising of the hip; and broken ribs, and I suffered from the spinal injury. I suffered from injury to the left hip and suffered from the tear in the buttocks, torn rectum.

Mr. Korte: I move to strike out, "suffered from broken ribs"; no such allegation in the complaint; no allegation of suffering from injury of the spinal column; and ask that the jury be told that those things are not to be considered. We have had no notice of them your honor.

Mr. Gray (reading from the complaint): "Suffered deep flesh wounds upon the left hip and lower part of his spine." And further on it says, "as a result of his injuries has suffered great physical pain and anguish and mental anguish and still suffers."

The Court: The jury are instructed not to consider evidence of any injury not covered by the complaint. "Broken ribs" is not covered by the complaint.

Q. Tell the jury the character of the suffering you endured?

A. I suffered from my shoulder and still suffer——

Q. No. I mean in the hospital, whether it was severe or otherwise?

A. It was severe. I suffered from these injuries as I said, and they sewed me up where I was torn in the buttocks and then they raised me up in bed after they had sewed me up, and a doctor at Malden, Washington, gave me a hypodermic of morphine——

Q. That was before you got to the hospital?

A. Yes sir.

Q. After you got to the hospital what was done so far as you know?

A. They put me in the operating room and sewed me up where I was torn open in the buttocks; then they put me back to bed and

the next morning one doctor got on one side of the bed and the other on the other and they raised me up and whirled me around and pulled the stitches out.

A. You say that was the next morning?

A. That was next morning.

Q. State what the result was of this? What suffering you endured from this injury to your rectum?

97 A. I suffered loss of control of the bowels.

Q. Was that there in the hospital?

A. Yes sir. It just felt like the stool just fell out of me.

Q. You say you stayed there until the 22nd of February?

A. Yes sir.

Q. Then you were taken where?

A. To Doctor Platt's hospital.

Q. How were you taken there?

Mr. Korte: It is immaterial how he was taken there.

Overruled.

A. Why they took me, put me on that little wagon there they haul patients round the hospital with and took me down stairs on the elevator then they put me on a stretcher and put me in the ambulance there and they hauled me over to Dr. Platt's hospital.

Q. How long were you there at Dr. Platt's hospital?

A. I think about a month or more, something like that.

Q. What was your condition there? State it as near as you can to the jury and explain to them the suffering that you endured while you were there and the character of it, whether severe or just slight?

A. I suffered from this wound in the buttocks. I was torn right in the rectum and then it was like that. (Indicating.) It left this flap hanging down, this chunk of flesh here along there when they whirled me round and pulled the stitches out——

Mr. Korte: I object to this pulling the stitches out, this is not a malpractice case.

The Court: I think it is improper to talk to the jury about pulling the stitches out. It is proper to tell about his suffering. Discussing the other might trench upon the question of malpractice which is not involved in this case.

Mr. Gray: I just simply want him to tell his sufferings.

The Court: The pain and anguish he suffered is all right for him to state.

Q. Tell the jury what pain and anguish you suffered?

A. I suffered from this scrap of flesh hanging down and there was a discharge of pus round there that is where they let it hang down while I was in this hospital, and they put a plaster on it but it fell down again and I was suffering so much misery I asked them to give me some relief some way.

Q. Just tell what you suffered?

Mr. Korte: I object to the last part of the answer as incompetent, irrelevant and immaterial, not in issue here.

Mr. Gray: Certainly it is a part of his sufferings.

The Court: I instruct the jury that there is no question of malpractice here.

98 Mr. Gray: Oh ~~no~~, none at all.

A. I was suffering from pain and the discharge of pus that was running from this wound here; I was laying in it, I was suffering so I tried to get relief——

Q. I don't care about that. Just tell what your suffering was. Where else did you suffer?

A. I suffered broken ribs——

Mr. Korte: I move to strike that out.

Q. Leave out broken ribs.

Mr. Korte: The jury have been instructed not to consider these broken ribs.

The Court: I instruct the jury not to consider broken ribs.

Mr. Gray: I don't think the question of broken ribs is very material.

Q. Go ahead.

A. Well I suffered the spinal and the broken shoulder blade. I suffered from the tear in the rectum and suffered from the injury to the hip.

Q. How long did that continue?

A. Well it continued right along, that is not all of them, that is I suffered from the wound in the buttocks, the shoulder and the hip.

Q. All the time you were in both hospitals?

A. Yes sir.

Q. What effect did that have upon the bowels?

A. I could not control my bowels?

Q. Well what was the result?

A. Well, while I was in bed, when my bowels worked it felt just like the stool just fell out of me.

Q. Did you control it until the nurse came to assist you?

Mr. Korte: Let him tell it.

Mr. Gray: I am letting him tell it.

Mr. Korte: You are not.

Q. Go on Mr. Kinzell.

A. Why I could then, that is I could feel the effect of it and, if she got the bed pan right off, I could hold it.

Q. Subsequent to leaving the hospital what was the fact with reference to your injuries and your sufferings?

A. I still suffered from the tear in my rectum.

Q. Just describe in what way you suffered and what effect it had upon your health?

A. I could not control my bowels. If I felt like I had to have a



movement of the bowels if I could not get to the toilet right off I could not hold myself.

Q. How long did that continue?

A. It has continued ever since I was injured.

99 Q. And up and until this time?

A. Yes sir, up until this day.

Q. Just tell the jury about your shoulder—what shoulder is that?

A. Right shoulder.

Q. What is the effect upon your shoulder?

A. Simply I can't handle that arm. It seems to be stiff in the elbow and my whole hand seems to get cold and at times kind of goes to sleep, seems kind of a prickling in it.

Q. Can you use that hand for any work?

A. No, not only from the elbow down.

Q. How is it as to being strong?

A. I have not got the strength in it. I have not got the grip.

Q. Has that caused you any pain?

A. Yes sir. It is continuous pain especially in damp and cold weather, continued pain; the damper the weather is the more it causes pain, the more it gives the pain.

Q. Have you had any difficulty with your hip?

A. Yes sir I have.

Q. What is the condition, the same as it has been up to this time? Do you still suffer from it as you described?

A. Yes sir I do.

Q. Just stand up and show the jury your arm?

A. (Stands up before the jury.)

Q. Can you hold your hand up a little so they can see?

A. (Does so.)

Q. Now about your thigh and hip, just state what the effect of these injuries is upon that?

A. My hip was injured so that when I put any weight on that hip, any length of time. I get so I just have to sit down and get a rest as soon as I can. I can walk if I take the weight off from it while I am walking.

Q. Are you able to walk any distance?

A. Yes, I can walk a little distance at a time.

Q. How far?

A. I never paid any close attention to it. I walk until that bothers me so and it hurts so I sit down and get a rest.

Q. Has the hip improved any now?

A. No sir it has not.

Q. Has it grown worse?

A. It has grown worse, yes.

Q. How about your shoulder and upper part of the arm?

A. It pains me. The damper the weather the more it seems to pain.

Q. How about strength in your leg?

A. I have not got the strength in it at all like the other one.

100

Q. Have you been able to do any work since that time?

A. No sir I have not.

Q. Have you tried?

A. I tried to do everything that I could, yes sir.

Q. What have you been doing?

A. I have been running a little pop corn stand where I can sit down.

Q. Whereabouts?

A. At St. Maries, Idaho.

Q. Now as a result of these injuries are you able to do any such work as running an engine?

A. No sir I am not.

Q. How does that interfere with your running an engine?

A. Because I have not got the strength to use my right arm, and my hip is knocked out, and my spinal, and *my* could not get by the physical examination.

Q. Could you run a stationary engine or some engine of that kind?

A. No sir.

Q. Has that arm sufficient strength to use it on a Dozer? The working on that?

A. No sir.

Q. Are you able to follow any other occupation than that you have followed as an engineer?

A. No sir.

Q. Have you any profession or anything of that kind?

A. No sir.

Mr. Gray: There may be something else, but I don't think of anything now. You can cross examine him.

The Court: We will take a short recess.

Jury duly admonished. Recess of ten minutes.

After recess, jury all present. Present as before.

Mr. Gray: One or two more questions:

Q. What was the effect upon this wound in your rectum when you had to have a stool?

A. The stool went right through into the wound.

Q. How about holding air?

A. I can't control wind from my stomach.

Cross-examination, WILLIAM KINZELL,

By Mr. Korte:

Q. You are unable to do anything, Kinzell, are you?

Mr. Gray: Let me ask you to address him as Mr. Kinzell.

Mr. Korte: I have a right to address him just as I please. I do not like to be pettifogged in this way.

The Court: Yes, he can address him as Kinzell.

Q. You are unable to do any work are you Mr. Kinzell?  
101 A. Yes sir, not work that requires any strength.

Q. You are unable to do any work that would require you to lift with the right arm?

A. Yes sir.

Q. You can't lift with it?

A. Can't lift anything with any weight, no sir.

Q. You cannot raise your arm away from your body?

A. I can raise it a little ways.

Q. How far? Try it and show the jury how far?

A. (Shows the jury.)

Q. You can't get it up any higher than that?

A. No sir.

Q. Can you raise it if it was lifted up?

A. I don't know. I don't think so.

Q. You don't think it could be lifted up if I took my hand and lifted it?

A. No sir I don't think so.

Mr. Gray: You can try it if you want to.

The Witness: Yes, you can try if you want to.

Q. I don't want to hurt you. (Counsel goes to the witness and tries it.) You cannot hold it out from your body? Is it stiff up here in the shoulder?

A. I suppose it is.

Q. Don't hold it tight to your body. Let it hang limp and see if I can lift it up?

A. It is hanging so.

Q. Is it stiff up at the shoulder?

A. I don't know what the trouble is.

Q. Can you let it out this way? (Indicating.)

A. You can pull it out that way there.

(Counsel goes back to his seat.)

Q. Now where is the pain in that shoulder? Can you point to it?

A. In the whole shoulder, shoulder blade, the shoulder and in the arm and in the hand.

Q. How far down on the arm?

A. Clear down in the arm the pain continually aches.

Q. Clear down to the hand do you mean?

A. Yes sir.

Q. Does it ache now?

A. Yes, it does, especially after you jerking on it.

Q. After I jerked on it?

A. Yes sir.

Q. Where else have you pain?

A. I have pain in my left hip and my spinal and—left hip and my spinal.

102 Q. You are unable to walk any long distance without a cane?

A. Yes sir; that is, I mean without resting.

Q. You can walk a short distance without a cane and then you must sit down and rest?

A. Yes sir.

Q. Then you walk along?

A. Yes sir.

Q. Can you walk without limping?

A. No sir.

Q. Where is the pain in the hip?

A. It is right in the hip.

Q. In the hip joint?

A. I suppose it is. I am not a physician.

Q. Point with your finger?

A. Right in there. (Indicating.)

Q. Stand up and point, turn round this way so the jury can see it?

A. Right in there. (Indicating.)

Q. Now the place where you *you* are injured is in the shoulder blade where you said it was fractured?

A. In the shoulder and the arm.

Q. You had a fracture, you said, of the shoulder blade?

A. Yes sir.

Q. The entire arm down to the end of your fingers pains you?

A. Well down to this point it seems to be in here, that pain.

Q. And in your hip where you pointed it out to the jury in the side?

A. Yes sir.

Q. Those are the only places you have any pain?

A. In my spinal.

Q. Where do you mean by your "spinal"? Point that out?

A. Down here. (Indicating.)

Q. In your buttocks?

A. No; right across my spine, right in here. (Indicating.)

Q. You went into the St. Maries hospital on the 16th of February, 1915?

A. Yes sir.

Q. And you stayed there how long?

A. Until the 27th of February.

Q. Then where did you go?

A. To Dr. Platt's hospital.

Q. How long did you stay in there?

A. Some wheres about a month I should judge, I didn't check up close.

Q. Then where did you go?

A. Then from there I went back to Lavista.

103 Q. How long did you stay at Lavista?

A. I never kept track of the date.

Q. Well about—When did you leave Lavista for good?

A. I don't remember the date.

Q. Well about the month is all I care about?

A. I never paid any attention to the month.

Q. Can't you give approximately what month it was?

A. The latter part of March or April, something like that I think.

A. I went back to North Dakota.

Q. How long did you stay there?

A. I never kept track of dates at all.

Q. Well about; don't care to pin you down?

A. I guess a couple of weeks.

Q. Where did you go then?

A. Went to St. Maries.

Q. And stayed there until when?

A. Until sometime in February.

Q. Then where did you go to?

A. Came back out to St. Maries.

Q. Been there since?

A. Yes sir.

Q. Now Mr. Kinzell you started to make this fill under which bridge at the time this injury occurred? There are two bridges there?

A. Yes sir.

Q. Can you tell the number of those bridges?

A. The first one was EE-140.

Q. And the other was 142?

A. Yes sir.

Q. 142 was nearer Ewan than 140 was it not?

A. Yes sir.

Q. The dirt that you were moving was taken from beyond Ewan and dumped in under bridge 140 was it not at the time you were injured?

A. Yes sir.

Q. You had originally started making that fill from dirt you took from Lone Pine had you?

A. Yes sir.

Q. You originally filled it up with what you call the Lidgerwood machinery?

A. Yes sir.

Q. Then when you got it filled up so you could you used the Bull Dozer?

A. Yes sir.

Q. In other words, you could not use that Bull Dozer until it got up to the ties?

104 A. Yes sir.

Q. Then you used it to go along and spread out the fill?

A. Yes sir.

Q. This bridge at 140 was not completed? There were rails and ties there? Was there any rails and ties?

A. Not completed?

Q. That is, the track had not been laid on the fill?

A. I don't know what you call it. There was timbers across there.

Q. Timbers yet of the bridge?

A. Yes sir.

Q. The bridge timbers were laid, were still lying there at the time you were filling there; isn't that right?

A. Yes sir.

Q. And the rails and ties were still on the bridge?

A. Yes sir.

Q. Parts of that fill had not come up completely to the ties, had it, in places?

A. Well, I wouldn't say that. I never gave that thorough inspection, but I know there was places where they did, where we did use the Dozer.

Q. There were places where it would still go down between the ties and bridge timbers? Is not that right?

A. Yes, the bridge timbers.

Q. Yes. What were they, timbers there on stringers and then cross ties on the bridge?

A. Timbers.

Q. There were places on that particular bridge where the dirt had not come up to these stringers and cross ties?

A. Yes sir.

Q. And that is why you were taking dirt from Ewan to complete that fill?

A. Yes sir.

Q. Now on this particular day they operated a service of two dirt trains from Ewan to these bridges 140 and 142?

A. Yes sir.

Q. On either one of those trains did they have the tail-air-hose on this train they were moving to bridges 1402 and 140? I am asking you the question, did they have any tail-air-hose on either one of those trains when they were connected up with the Bull Dozer?

A. Yes sir this other one did.

Q. I am speaking of 140 and 142, when you were filling these with dirt they were taking from Ewan, neither one of those trains had any tail-air-hose on it?

A. Yes sir, that other one did.

105 Q. But this one did not at this particular time have any tail-air-hose on it?

A. I couldn't say at this particular time.

Q. You couldn't see it coming towards you and don't know whether it had a tail-air-hose or not?

A. I don't know, no.

Q. No. Either one of those trains did not have a tail-air-hose on it?

A. I couldn't say whether this one had or not.

Q. This one didn't have?

A. I couldn't say whether it did or not.

Q. But one of them did have tail-air-hose on it?

A. One of them did have air hose.

Q. And one of them didn't?

A. I can't say whether the other one did or not. That one did I know.

Q. Which one? The one that was bucking into the Dozer?

A. One of them had an air hose on.

Q. So this one that struck you was the one that had no air hose on it?

Mr. Gray: I object to that. He said he didn't know whether it had one or not.

Mr. Korte: I do not like to be interrupted in my cross-examination. If counsel has an objection to make I wish he would make it.

Mr. Gray: He cannot assume he has so testified.

The Court: I do not think so either. I do not think it is proper. The witness has stated one had air hose on but he didn't know whether the one that struck him had air hose on or not. Now you are assuming that he testified that the one that struck him had air hose on. I sustain the objection.

Q. Where were you standing, inside the brace rods or outside the brace rods on that Bull Dozer?

A. I never paid close enough attention to it.

Q. You said you had hold of the brace rod when they coupled and knocked you off?

A. Yes I had hold of one.

Q. Of course you could not have had hold of both of them. You know how they are, one runs diagonally to the right and one diagonally to the left. Which side of the brace rods were you at that time, on the inside or on the outside towards the cars that were moving towards you?

A. I was on the side towards the train.

Q. Then you were between the brace rods—How many feet between the brace rod and the end of the Bull Dozer?

A. I never measured it.

106 Q. Give it approximately?

A. I couldn't say. I would not want to say because I don't know. I never measured how many feet it is.

Q. When you first saw the train coming it was about a quarter or half mile away?

A. Yes sir, about a quarter or half a mile away.

Q. It was then going at a rate as you thought of ten miles an hour?

Mr. Gray: He didn't say anything of the kind. He can't assume that he said something that he has not said. It is the same old trap method.

Q. Did you state how fast the train was coming when you first saw it a quarter of a mile away?

A. Well I didn't say. I said I supposed it would be going the usual gait.

Q. How fast was it coming toward you when you first saw it?

A. I couldn't say.

Q. You are an experienced railroad man, able to judge speeds of trains are you not?



A. Well it would depend upon whether I am within a reasonable distance.

Q. Within that distance are you able to judge how this train was running when you saw it first a quarter of a mile away?

A. I did not suppose it was going over four miles an hour.

Q. You can't tell whether it was going four or ten miles an hour?

A. I supposed at that time it was not running over four miles an hour.

Q. Do you say this train, when it coupled onto the Bull Dozer, was moving at ten miles an hour?

A. Well it was going fast enough to give a hard blow.

Q. How fast was it going then when it struck the Bull Dozer?

A. Well I should judge—I didn't have much time to think but I should judge from the force, and my hold being torn loose and everything, I judge it was going about ten miles an hour.

Q. Where was the rear brakeman, on the car next to the Bull Dozer?

A. He was on the first car nearest to me.

Q. It was a loaded car was it not, with material?

A. Yes sir.

Q. Well banked up?

A. Supposed to be. I didn't have time to look very close.

Q. I know you didn't have time. If you saw anything you saw it was loaded ordinarily like these dump cars are loaded with dirt?

A. It was supposed to be a loaded train.

107 Q. He was at your end of the car?

A. I didn't notice as to how close, but think he was at the further end.

Q. Do you know what happened to him when they hit the Bull Dozer, whether it knocked him off or not?

A. How could I know when I fell between the cars?

Q. Then you don't know whether he stayed on the car or fell off. You said you saw him giving emergency signals or what you call washout signals, is that true?

A. Yes sir.

Q. He was on the rear end of the dump car? He was on the other end of the dump car from you?

A. Yes sir.

Q. Is that true?

A. Yes sir.

Q. How long was it from the time you saw him giving these emergency signals until they struck the Bull Dozer?

A. I couldn't say.

Q. Give an idea?

A. I didn't have a watch out.

Q. I know but give us an idea?

A. I couldn't say. I could say I didn't have more than time to look around when they slammed right into me.

Q. Was it about the time they coupled on to the Bull Dozer you saw him giving these emergency signals?

A. I had just time to look over my shoulder.

Q. That would be about a second of time would it not?

A. Well I never figured the time out as I told you before.

Q. Now in these emergency signals did you see him waive once or twice or three times?

A. I never counted the times.

Q. Indicate to the jury what you saw him do? Indicate the manner in which it was done?

A. Well when I looked over my shoulder I just saw him flapping both arms as fast as he could.

Q. Did he more than once?

A. I didn't count them. He was making his arms go so fast I couldn't count them.

Q. You say you held onto the brace rods with both hands?

Mr. Gray: I object to that. He didn't say that.

Mr. Korte: He said he held on to the brace rods with both hands.

The Court: He said he held on to the brace rods with one hand and grabbed something else with the other.

Q. Go ahead and tell how you held on to the brace rod?

108 A. With my right hand I held on to the brace rod and with my left hand I had hold of the crank shaft there that we raised the wing with.

Q. You had hold of the brace rod with your right hand?

A. Yes sir.

Q. And with your left hand you had hold of this crank shaft?

A. Yes sir.

Q. You were facing towards the east?

A. Yes sir.

Q. And the train of course, was coming from the west?

A. Yes.

Q. You would be in front of the brace rod and between the brace rod and the west end of the Bull Dozer?

A. I was at the west end of the Bull Dozer. I was towards the end where the train was coming.

Q. Which side of the Bull Dozer would that be, right hand side or left hand side facing east?

A. Well, I didn't pay close attention to it but must have been right close to the left hand side because I had my left hand on that—

Q. Yes, it would be on the left hand side that you stood. And where was the Bull Dozer with reference to the west end of Bridge 140?

A. 100 to 150 feet.

Q. It was later put where that little bunch of gravel was located

there. Do you recollect that place where they had some gravel there mixing some concrete?

A. I didn't notice.

Q. The Bull Dozer had been there some time before they hooked on to it?

A. Yes sir.

Q. Were you cleaning the track in the vicinity of the Bull Dozer all the time?

A. I was east of it.

Q. You came to the Bull Dozer after you got through cleaning and was ready to couple onto this train?

A. Yes sir.

Q. You don't know whether it was at that particular spot or not where they had gravel and sand?

A. I didn't pay that close attention. I was not marking the spot.

Q. So that, as I understand you Mr. Kinzell, you were watching or looking to see where to spot the train and dump it at the time when they attempted to couple onto this Bull Dozer. Is that it?

A. Yes. I was sizing up the fill there to ascertain where to dump the next train.

109 Q. You were looking east then?

A. Yes sir.

Q. Along the bridge that was to be filled?

A. Yes sir.

Q. You were not facing the train were you when it was coming on to you?

A. No sir.

Witness excused.

HIRAM S. LEE, a witness on the part of the Plaintiff, was called and being duly sworn testified as follows, on examination.

By Mr. Gray:

Q. State your name and residence?

A. Hiram S. Lee.

Q. Where do you live

A. My family is in Montana.

Q. Where were you working on February 16th, 1915?

A. At Ewan, Washington.

Q. What were you doing there?

A. I was working for the Milwaukee railroad.

Q. In what capacity?

A. I was working with Kinzell on the Dozer.

Q. That's the machine with wings, that he has described?

A. Yes sir.

Q. Were you there the time the accident occurred to him?

A. I was.

Mr. Gray: There are a few more questions I want to ask Mr. Kinzell before I proceed with him.

The Court: You can do so, and excuse this witness temporarily.

Witness excused temporarily.

WILLIAM KINZELL resumes the stand for redirect examination.

By Mr. Gray:

Q. Mr. Korte asked you some questions about this bridge, how far the work had progressed and the filling.

Mr. Korte: I object to that as not proper redirect examination. He stated how far it had progressed.

Mr. Gray: Then I will recall him.

The Court: You can do so.

WILLIAM KINZELL, recalled.

Mr. Korte: I think it has been answered.

The Court: The objection is overruled.

A. Well, it was pretty well finished up with dirt and gravel in between the ties and rails.

Q. How far up between the ties was the gravel in places on the bridge?

110 A. It was level.

Q. But in other places it was lower?

A. Yes. It was pretty well filled up, however, on the west because we had to take the rocks out in between because it was filled up level there in most places.

Q. Between what?

A. Between the rails.

Cross-examination, WILLIAM KINZELL.

By Mr. Korte:

Q. The rails and ties were still there resting on cross pieces of the bridge and the stringers; is that right?

A. I don't know what it was resting on. I know we filled to the rails.

Q. You were not there when they commenced to fill the bridge and take the dirt from Lone Pine?

A. Yes sir.

Q. You know then the rails laid on the cross ties which were fastened to the bridge?

A. I know it must have been fastened to something.

Q. Well, these were the things that it was fastened to when you were hurt, is that right?

A. Well, we were working there right along.

Q. Answer that yes or no. You know as a railroad man what I want.

A. I don't know what they were fastened onto, whether it was ties or what it was.

Q. They were fastened to the same things that they were fastened to when they commenced to make that fill?

A. I couldn't say that, because the bridge crew was working there right along. I didn't pay any attention to what they were doing.

Q. They didn't take out ties and rails while you were working there on the bridge?

A. I don't know what they took out. The rails were there.

Q. Yes sir. And the rails were resting upon the same thing they were resting upon all the time you were doing that work?

A. Just as I said before, I don't know, because the bridge crew was working there.

Q. You don't want to be understood as knowing what they were resting upon?

A. I didn't say that.

Redirect Examination, WILLIAM KINZELL.

By Mr. Gray:

Q. This gravel as it came up between the ties was used as ballast of the road?

111 A. Yes sir. •

Mr. Korte: I object to that as a conclusion of the witness.

Sustained.

Q. Was there anything beneath those ties upon which the rail rested?

A. Yes sir, gravel.

Q. Where did they get that gravel?

A. They got that from Ewan.

Q. How were they getting it?

A. They brought it out in cars.

Q. What did they spread it upon?

A. We spread it around with a shovel and with the Dozer.

Q. That is the work you were doing?

A. Yes sir.

Recross-examination, WILLIAM KINZELL.

By Mr. Korte:

Q. That is the same material they were making the fill with that you have now described and were putting in between the ties?

A. Yes sir—well, it was the stuff they brought out from Ewan and put in there.

Q. And the same material that was being used to make that fill?

A. I didn't make any inspection of the fill.

Q. You don't want to be understood as knowing anything about that either, do you?

A. Well, I didn't make any inspection of it at all.

Mr. Korte: That's all.

Witness excused.

HIRAM S. LEE resumed the stand for further direct examination.

By Mr. Gray:

Q. What duties were you performing on the Dozer?

A. I was helping work the Dozer, raise and lower those wings.

Q. Who had charge of the Dozer?

A. Mr. Kinzell.

Q. What was he doing?

A. He done the same as I did to the other end.

Q. Where did the gravel come from you used there?

A. From Ewan.

Mr. Korte: Well, the material, whatever it was.

Q. The material, whatever it was?

A. From Ewan.

Q. How was it dumped?

112 A. It was dumped from the dump cars.

Q. What was the Dozer used for?

A. The Dozer was used to spread the gravel or material used there making that fill. It was used in spreading that, widening the fill.

Q. After using the Dozer did you and Mr. Kinzell have any other work there?

A. Yes sir.

Q. What was it?

A. Between the rails and keep the track in shape.

Q. What did you do that with?

A. Shovels.

Q. That was the material that was dumped there that the Dozer did not take up?

A. Yes sir.

Q. Then what did you do after cleaning up?

A. Why, we would go back to the Dozer if we got through in time, where the Dozer was.

Q. Now as I understand it the material was brought out to you in trains?

A. Yes.

Q. Did the engine go ahead or push the train?

A. Pushed it.

Q. About how many cars would there be in the train?

A. Why I think there was 25.

Q. Were you there at the time Mr. Kinzell was injured?

A. I was.

Q. Was there anyone else working there with you and Kinzell on the Dozer?

A. There was another man there, yes.

Q. What was his name?

A. I think his name was Belterzone as near as I can remember.

Q. Where were you at the time of the accident?

A. I was on the Dozer.

Q. On the Dozer?

A. Yes sir.

Q. Where was it your custom to be at the time this gravel train approached?

A. Well, we was supposed to be on the Dozer.

Q. How did the gravel train attach itself to the Dozer?

A. By coupling.

Q. Whose business was it to do that?

A. The train men.

Q. Did you have any duty about that or have anything to do with that?

113 A. I did not.

Q. Did Kinzell?

A. Not that I know of.

Q. Now Mr. Lee, were the train men under Mr. Kinzell?

A. No, I think not.

Q. At the time of the injury or accident will you just describe what occurred in your own way?

A. That is, how it happened?

Q. Yes, how it happened.

A. Well, when we got through with the shovels we walked right to this Dozer and got on, and the train was coming across the bridge then. The engine was pushing the train to us.

Q. Where was that? Where is that bridge?

A. That is right by Lavista.

Q. That would be further west would it?

A. Yes, it would be between Ewan and Lavista.

Q. Which way was the train coming?

A. Why, it was coming to us, east or in an eastern direction—  
Now I will not be sure—

Q. I don't care about that—. All right, just go ahead and tell what happened?

A. When we got through, as I stated, we went back to get on the Dozer and they came down to couple on, but they were going a little faster, I think, than they should have been when they struck us and knocked Mr. Kinzell off and he went under the wheels.

Q. Where were you standing at that time?

A. I was standing behind the inner brace rods that run down.

Q. Inner brake rods. When did you see that train as it approached the Dozer?

A. I seen it at the time it came out of the cut at the opposite bridge.

Q. Were you looking at it all the time?



A. Not all the time, no.

Q. Did you say anything, make any statement, just prior to its striking?

A. Just about the time they struck us.

Q. What did you say?

A. I told Mr. Kinzell to look out; that they were going to bump us.

Q. What did you do then?

A. Well, I took ahold of that rod as tight as I possibly could.

Q. What did Kinzell do?

A. He did too. He took hold of one rod and the crank shaft.

Q. Which way was he facing?

114 A. He was facing in an eastern direction.

Q. What happened then?

A. Why, they struck the Dozer.

Q. State what kind of a bump it gave?

A. Well, it gave a good one.

Q. By "a good one" what do you mean?

A. Well, good and hard one.

Q. What happened to Kinzell?

A. He went under the wheels.

Q. How? Just state where?

A. He fell between the Dozer and the first car that struck.

Q. How about you?

A. Well, I struck with my back against the crank shaft. It jerked me loose from the rod I had hold of.

Q. Broke your hold on the rod?

A. Yes sir.

Q. And you fell against the crank shaft?

A. Yes, I did.

Q. Did you see any one on the train as it was approaching?

A. I did.

Q. Who?

A. Mr. Moody.

Q. What was he?

A. He was the brakeman.

Q. Where was he?

A. He stood in the far end of the first car that struck us.

Q. What was he doing?

A. Why, right at the time, I couldn't say what he was doing.

Q. What was he doing?

A. Well, he gave the very quick stop signals.

Q. When was that with reference to the time it struck the Dozer?

A. Right after and at the time.

Q. How close to the Dozer was the car when you called out to Kinzell that they were going to bump you, something of that kind?

A. Well, it could not have been very far, not over half a length, I don't think.

Q. By half a length, you mean half a car?

A. Half a car length.

Q. How long were those cars, approximately, if you know?

A. Well, I couldn't say.

Mr. Korte: Thirty feet I judge, possibly.

Q. Well, something like that.

(A voice: Thirty-four.)

Q. Just state whether or not the brakes were applied to the gravel train prior to striking the Dozer?

115 A. No, I don't think so.

Q. When were they applied?

A. Just after it struck us. I jumped off. Kinzell fell between the wheels. I dodged over and jumped, then I heard the brakes screech, and that's what threw me down. I was thrown headlong as I left the Dozer.

Q. Did you hear the brakes applied before that?

A. I did not.

Q. How far did the car go after the brakes were applied?

A. Well, to my opinion, they didn't go at all.

Q. They were stopped?

A. Right there then.

Q. Then you were thrown off headlong were you?

A. I was.

Q. Then what did you do?

A. I got up and ran back to Kinzell.

Q. How far was he dragged if you know, approximately?

A. 25 or 30 feet.

Q. Then what happened? Did he get off the rail?

A. Yes. He was thrown off some way from under the wheels.

Q. How far did the car go then?

A. Well, it was somewhere within about a car's length.

Q. Did you know whether there was any tail-air-hose on that train?

A. There was not at that time.

Q. If there had been a tail-air-hose there how soon could the train have been stopped?

Mr. Korte: I object to that on the ground that the witness is not qualified.

Q. What railroad experience have you had?

A. Not a great deal.

Q. How long had you been working on the Dozer?

A. I don't know just exactly, somewhere round the 1st of June, that is it might have been the 15th; not sure.

Q. How was the coupling ordinarily made there on the Dozer?

A. It is an automatic coupling; had to get probably two, or such a matter, miles per hour.

Q. From your experience there were you able to judge about the speed the train was going at the time they struck the Dozer?

A. I think I would be perfectly safe in saying ten miles an hour.

Q. Do you know who your superintendent was, the man under whom you were working?

116 A. No, I don't believe I do.

Q. You don't know. Mr. Lee, after the train was stopped what was done with Kinzell?

A. Why, they took the train back and brought an engine and caboose and took him to St. Maries.

Q. Did you go along?

A. I did.

Q. State what his condition was as you observed it there, whether he was suffering or not?

A. Yes, he was.

Q. How many employes were there on the gravel train?

A. There was supposed to be a conductor——

Mr. Korte: I object to supposing.

A. Well, there were two, but not on the train. There was one brakeman on the train and one in the engine cab.

Q. In the engine cab?

A. Yes sir.

Q. Who were the others beside the engineer and fireman?

A. There was one brakeman. I don't know his name.

Q. And one other, conductor of the train?

A. He was on the engine.

Q. They were all in the engine cab except this one man?

A. Except this one man.

Q. Was there any one else in the engine cab?

A. Yes sir.

Q. Who?

A. Mr. Shannessy.

Q. Who was he?

A. He was over the work; was assistant train master I suppose.

Q. The work you were doing there?

A. Yes sir.

Q. What company were you working for at the time?

A. I was working for the Milwaukee.

Q. Chicago, Milwaukee & St. Paul?

A. Yes sir.

Cross-examination, HIRAM S. LEE.

By Mr. Korte:

Q. Could you see the men in the cab you say were there?

A. No, but I seen them get out.

Q. Could you see the engineer from where you were?

A. No, not very plain.

Mr. Gray: Mr. Korte, I would like to ask him about a matter I forgot.

Mr. Korte: All right. Go ahead.

117 Direct examination resumed, HIRAM S. LEE.

By Mr. Gray:

Q. What was the condition of the line westerly from the place where the Dozer was?

A. Well it would be commonly called and it was a straight line but in the track it was not.

Q. What do you mean by "it was not"?

A. It was straight and we could see all right enough, but that bridge was on a curve.

Q. How far back could the Dozer be seen?

A. From the time they came out of the cut there, a quarter of a mile or more, right on to a half a mile, and might be not that far, but it is on or about that.

Q. For a considerable distance?

A. Yes sir.

Cross-examination, HIRAM S. LEE.

By Mr. Korte:

Q. You could see the train coming when the train came out of the cut. You were on the Dozer were you?

A. I was getting on then.

Q. Yes. How far away was it then when you first noticed it coming towards you?

A. I stated somewheres on or about half a mile.

Q. Did you notice it all the time until it came and made the coupling?

A. Not all the time, no.

Q. What were you doing?

A. We were taking a look round.

Q. When did you notice the train particularly and keep your eyes on it till it made the coupling?

A. Just before they struck us.

Q. How fast was it going when you saw that?

A. I couldn't tell that.

Q. Give an idea?

A. Well, it was probably going somewheres around five or ten miles.

Q. How far away from the Dozer was it when it was going five to ten miles?

A. I said about some wheres around half a mile, on or about.

Q. Was it going five or ten miles an hour?

A. On or about that.

Q. What do you mean? Can't you tell?

A. I would say ten miles.

Q. Would you think it was going 15?

A. No.

118 Q. Can't you tell how fast it was going when you saw it coming there?

A. No. I am just giving my judgment that it was going about ten miles.

Q. How long did they continue to keep up that ten mile speed before it slowed down?

A. Until it struck us.

Q. So it kept up that speed and didn't slow down at all until it struck the Dozer?

A. Until it struck the Dozer.

Q. How long did you watch it coming at ten miles an hour?

A. I didn't state that.

Q. How far away was it you watched it continuously until it struck the Dozer?

A. From the time that I seen it I don't know just exactly how long I did look at it but it was not only just a short time until the time it struck.

Q. How far away from the Dozer was it, how many car lengths?

A. I don't think it was over a car, half a car or something like that, because I didn't have time to——

Q. About that time had you and Kinzell been talking——

A. Well, we were looking and talking about where we would dump the thing.

Q. Which way were you both looking?

A. I was looking to the east at the time.

Q. Which way was Kinzell looking?

A. He was looking towards the eastern direction.

Q. He was not facing the train as it was coupling up?

A. No, he was not because he was standing with his back to the train looking away.

Q. I mean he was not facing them.

A. No sir.

Q. On which side of this brace rod was he?

A. It would be inside.

Q. With his back towards the train that was coming?

A. Yes sir.

Q. When it came up close and you hollered he looked over his shoulder?

A. He did.

Q. Can you write your name?

A. Yes sir.

Q. Would you write it on here? (Handing witness a paper.)

Mr. Gray. Now what is the purpose of this?

Mr. Korte: I will tell you the purpose of it later.

Mr. Gray: What is the purpose of it? I object to it.

119 Q. Will you write your name on there?

A. No.

Q. You will not. Is that your signature, Mr. Lee? (Showing witness a paper.)

Mr. Gray: Let me see it.

Mr. Korte: I object to his seeing it.

The Court: Let him answer.

Q. Is that your signature Mr. Lee, at the bottom there, Hyrum Lee?

A. Yes sir.

Mr. Korte: That's all I want.

Mr. Gray: Now let me see it.

Mr. Korte: I object to being interrupted in my examination.

Mr. Gray: I have a right when a witness is cross-examined on a paper, to see it.

Q. Do you say you signed that?

A. I said that's my signature.

Q. You signed that then didn't you?

A. I didn't say whether I signed it or not.

Q. That is your signature then is it not?

A. That's the way I spell my name.

Q. Did you write that there yourself?

A. Well sir, I will not state whether I did or not.

Mr. Gray: Now I think I have a right to see it.

Mr. Korte: I want to cross-examine this witness and don't propose to be interrupted in my cross-examination.

Mr. Gray: That is your method.

Mr. Korte: That is your method, trying to get ahold of a paper that you know you have no right to. You can't pull any such stunt on me.

Q. You state you did not write Hyrum Lee on this piece of paper?

A. I didn't state I didn't. I will not state I did.

Said paper marked for identification, Defendant's Exhibit No. 1.

Mr. Korte: Defendant offers in evidence at this time the paper which the witness has identified as having signed, and ask- that it be read in evidence, marked Defendant's Exhibit No. 1.

Mr. Gray: I object to it as not proper cross-examination.

The Court: The objection will be sustained to its being offered in evidence at the present time under our rules. I suppose it will be proper to admit it on your side of the case.

Q. I ask the witness then to sign his name to this paper I hand him that I may get his signature, if Your Honor please?

The Court: Yes. He will be permitted to do that now.

120 Q. Sign your name in full, Hyrum Lee.

(Paper handed to witness upon which he writes his name.

The same is marked for identification, Defendant's Exhibit No. 2.

Mr. Gray: I withdraw my objection to both of them.

The Court: They will be admitted.

(Said Defendant's Exhibits Nos. 1 and 2 were received in evidence.)

Mr. Gray: I move to strike it out because there is nothing conflicting with the testimony of the witness.

Motion denied.

Q. Where have you been living the last six months?

A. My family is in Missoula.

Q. Where have you been living?

A. Any place where I can get work.

Q. Where have you been working?

A. Been working every place where I could get work.

Q. Where is one place?

A. In Mullan.

Q. How long have you been working in Mullan?

A. I worked there about three weeks.

Q. Where did you work before that?

A. In Wallace.

Q. How long did you work there?

A. A couple or three weeks or such a matter.

Q. Where did you work before that?

A. In Montana.

Q. Where?

A. At Milltown.

Q. For whom?

A. For the sawmill company there.

Q. What's the name of it?

A. Now I don't recollect.

Q. How long did you work for that mill company that you don't know the name of?

A. About a month.

Q. When was that?

A. Well, I don't recollect the exact date.

Q. Give the month?

A. Well, now I don't think I can.

Q. Give it as near as you can?

A. I think it was in May.

Q. Where were you working in the fore part of September, say, round about the 8th, 9th or 10th of September?

A. I started to work here, I think it was the 9th, Sunday.

Q. Where were you working on the 8th?

121 A. I don't know that I was working.

Q. Where were you?

Mr. Gray: I don't see the materiality of this cross-examination. If I thought there was some point for the jury I would not object to it.

The Court: Well, I will not stop it yet.

Q. Where were you on the 8th?

A. I don't know that I was working.

Q. What were you doing?

A. I couldn't say for sure.

Q. Where were you? In what town?



A. I don't know for sure whether I was in Montana or not. I think I was. I came here the 9th.

Q. What were you doing on that day in Montana, or don't you remember?

A. Not for sure, no.

Q. Why don't you remember?

Mr. Gray: I object to that as improper.

Sustained.

Q. Were you in a physical condition that you could not remember?

Mr. Gray: I object to that as incompetent, irrelevant and immaterial and not proper cross-examination.

Sustained.

Q. Do you know Judge Lamb of Ewan, Justice of the Peace?

A. I know a couple, yes.

Q. This is the old gentleman, Justice of the Peace there at Ewan?

A. Will Lamb, is it?

Q. Yes, Will Lamb.

A. Yes, I know him.

Q. You knew him quite well, didn't you? Do you remember having a talk with him and several others shortly after the accident there in Ewan in which the matter of Mr. Kinzell's injuries was brought up, it was shortly after the accident, I would not say whether it was one, two or three weeks?

A. With Bill Lamb? I did not.

Q. Did you not have a talk there in the presence of Mr. Lamb and others in which you made this statement, "This accident to Mr. Kinzell was wholly due to his own fault and he could have avoided it."

Mr. Gray: I object to that as incompetent, irrelevant and immaterial; not impeaching of this witness.

The Court: It is not in the form of an impeaching question.

Mr. Gray: Then I object to it as immaterial.

Mr. Korte: I am asking it as an impeaching question, pure and simple.

122 The Court: I think you should give the time, place and persons present.

Q. In front of Mr. Jenson's store in Ewan, in presence of Mr. Will Lamb, a Justice of the Peace and Mr. Burmeister, shortly after the accident, about two or three weeks?

A. And I stated that it was his fault?

Q. Yes, sir. Did you or did you not so state?

Mr. Gray: I object to that on the ground that if he did make any such statement, it is not impeaching in any way.

The Court: I sustain the objection.

Mr. Korte: Exception please.

The Court: Exception allowed.

Witness excused.

Thereupon Mrs. Kinzell was called but could not be found.

Mr. Gray: I can use the time until adjournment in qualifying Dr. Sheppard but I do not want to put him on until tomorrow.

Dr. JOHN H. SHEPHERD, a witness on the part of the Plaintiff, was called and being duly sworn testified as follows on examination:

By Mr. Gray:

Mr. Korte: I admit his qualifications and so forth.

Mr. Gray: I want to show his general experience.

Q. State your name, residence and occupation?

A. John H. Shepherd, Cœur d'Alene, Idaho, physician and surgeon.

Q. Doctor, where were you educated for the practice of your profession and what experience have you had in its practice?

A. University of Chicago, Rush Medical College, Michael Reese Hospital, Chicago; been practicing in Cœur d'Alene ten years; handled wood and mill workers in sawmills in that vicinity.

Q. You graduated from Rush Medical College?

A. I did.

Q. What experience did you have in the Michael Reese hospital? Where is that hospital?

A. Michael Reese hospital is in Chicago; at the time I was interne we had capacity for about 250 patients. I was there for twenty-four months as interne, and sixteen months of that time I was on the surgical service and eight months on the medical service.

Q. In the course of your practice have you had occasion to examine many cases of violent injuries and the results of those injuries upon the individuals?

A. I have.

123 Q. In this work that you speak of in Cœur d'Alene, what has been the character of that work in the general sense as far as having had opportunity to observe and treat such cases?

A. There has been a large amount of it in accident work; been carrying contracts there running as low as 350 a month and as high as 1500 a month, of men under contract employed in the sawmills, in the woods and in railroad contract work.

Q. Are you acquainted with Mr. Kinzell?

A. I met him five or six months after he was injured, for the first time.

Q. Did you examine him at that time?

A. I did.

Q. Have you seen him since?

A. I have.

Q. How frequently, how many times?

A. I think four times since.

Q. Just give a general idea of the period elapsing between your different examinations of him, Doctor?

A. I think it was about four or five months between the first and second examinations; then I saw him in May of this year; then day before yesterday.

Q. Did you examine him on each of these occasions?

A. I did.

Q. Thoroughly?

A. I did.

At this time the jury was duly admonished and excused until 9:30 o'clock tomorrow morning, to which time court adjourned.

Wednesday, November 1st, A. D. 1916—

9:30 o'clock a. m.

At this time the record of yesterday's proceedings was read and approved, the jury all being present, present as before, Mr. James A. Wayne appearing with Mr. Gray as counsel for plaintiff, the trial of this cause proceeded as follows:

Mrs. WILLIAM KINZELL, was called and being duly sworn as a witness on the part of the plaintiff, testified as follows on examination:

By Mr. Wayne:

Q. State your name?

A. Mrs. William Kinzell.

Q. You are the wife of the plaintiff in this action?

A. I am.

Q. Mrs. Kinzell do you remember the day your husband was injured?

A. Yes sir.

124 Q. About how long after his injury before you saw him?

A. They told me it was three-quarters of an hour.

Q. Where did you see him?

A. In the caboose.

Q. Where was the caboose?

A. They brought him to my car in a caboose.

Q. Near what town?

A. Near Lavista, at Lavista.

Q. What was his condition at the time you first saw him as to whether he was suffering any pain?

A. He seemed to be suffering terribly. I thought he was dying. He was complaining of his feet being cold, and fighting for his breath. He could not breathe. He wanted to be raised up. And he said please don't touch me. I felt of his feet and they were wet. It had been raining. The conductor gave me time and as soon as I could I put on dry things on his feet.

Q. How long was he at your car before he went to St. Maries?

A. Just long enough for me to put on my things, get my suit case and lock up the car, which took about five or six minutes.

Q. Did you go then over to St. Maries with him?

A. I did. I went to the hospital in St. Maries with him.

Q. State whether or not he was suffering any pain on the way to St. Maries?

A. He seemed to be suffering terribly from Lavista to Malden and at Malden the doctor gave him a hypodermic which seemed to put him in a kind of stupor and he laid as if dead until we got to St. Maries.

Q. How long was you with him at St. Maries?

A. I stayed with him all the afternoon and came away that evening and went back in the morning and stayed with him two weeks.

Q. Were you with him at the hospital?

A. I had rooms. I came to the hospital the first thing in the morning and then I came in the afternoon and stayed until they gave him the hypodermic in the evening.

Q. During that time state whether or not you helped in caring for him?

A. Yes, I helped all the time.

Q. Now the first afternoon he was taken there to St. Maries what time did you leave that afternoon or evening?

A. I left on the evening train. I think it was about 8 o'clock or a little after.

Q. State whether or not he was suffering during the time you were with him, that is at St. Maries?

A. Yes, he suffered all the time.

125 Q. After your return, for the next two weeks you were with him what was his condition?

A. The first five days he seemed to be about the same; didn't notice any change. After the fifth day he seemed to have a little relief.

Q. What was his condition during this time as to being delirious or otherwise.

A. The first day he was delirious. After that he didn't seem to be delirious.

Q. Do you know what if any means were taken to alleviate his sufferings?

Mr. Korte: I object to that as being immaterial and irrelevant; no issues involving treatment.

Mr. Wayne: It all goes to show the degree of suffering.

Overruled.

Mr. Korte: Exception.

Q. Go ahead Mrs. Kinzell.

A. The only thing they done for him was to put adhesive plaster on his hips and they put his arm in a sling.

Mr. Korte: I move to strike out the answer for the same reasons given in the objection.

The Court: It seems to me this trenches a good deal on a question of malpractice. This is not a question of treatment.

Mr. Wayne: That was not the object of the question.

The Court: I think I will strike it out.

Q. What was given him, if you know, to stop his suffering?

A. Hypodermic was all he had.

Mr. Korte: Same objection and move to strike out the answer for the same reason urged against the last answer previous to this.

Mr. Gray: It shows they had to put him under opiates in order for him to stand it.

Overruled.

Q. Mrs. Kinzell, during this time if you remember, the first two weeks after Mr. Kinzell's injury, what did you notice in so far as his breathing was concerned?

A. He said *he* hurt him all the time to breathe and——

Mr. Korte: I move to strike that as hearsay and incompetent.

Motion denied.

A. He breathed with great difficulty and seemed to be in great pain. He moaned and ground his teeth. The first night when I would press on his chest you could hear the bones rattling.

Q. Did you during this time notice the condition of his shoulder?

A. Yes. His shoulder was swelled terribly and black and blue; seemed to be blacked in different places.

126 Q. When did you first observe the condition of his hip or hips?

A. Why, his hips was both cut open. They seemed to bother him too there.

Q. When did you first notice them?

A. Well, I didn't see them until the fifth day.

Q. Then you say they were both cut open?

A. Yes sir.

Q. During the time you attended him, Mrs. Kinzell, will you state to the jury whether or not Mr. Kinzell had any trouble with his bowels?

A. Well, the first four days they didn't move, but after that he had considerable trouble with them on account of the wound. When I attended to him, when I was there I tended to him up to the eleventh day, so I was there. When his bowels moved I took care of him. The doctor told me he would be able to take care of them himself after that he thought.

Mr. Korte. I move that be stricken out as incompetent, irrelevant and immaterial.

The Court: Her evidence as to what the doctor told her is stricken out, that part of the answer.

Q. What was the condition of Mr. Kinzell and what did you do for him?

Mr. Korte: Object to that as irrelevant and immaterial under the pleadings.

Overruled.

A. He needed attention and he could not take care of himself, so I took care of him. I——

Mr. Korte: I move the answer be stricken out for the same reason.

Mr. Wayne: She had not finished her answer.

Mr. Korte: I withdraw the objection until she finishes her answer.

A. I washed him and took care of him after his bowels moved.

Mr. Korte: I move to strike out that part of the answer prior to, "I washed him and took care of him when his bowels moved."

The Court: Motion granted.

Q. What is the fact as to whether or not your husband has been able to work since his injury?

Mr. Korte: I object to that as calling for a conclusion, not a fact; witness is not competent to give an opinion, that is for the jury to say.

Overruled.

A. He has never been able to do any work since the accident.

Mr. Korte: I move to strike out the answer for the reason in the objection to the question.

127 Motion denied.

Q. What is the fact as to whether or not since the day of Mr. Kinzell's injury and since leaving the hospital he has suffered with his shoulder and hip and with the condition existing in the rectum?

A. Yes. And he suffers with his ribs. Sometimes——

Mr. Gray: Never mind the ribs.

A. Sometimes he suffers more than others. Some nights he don't sleep hardly at all.

Cross-examination, Mrs. WILLIAM KINZELL.

By Mr. Korte:

Q. There are no houses at this little place called Lavista where you lived?

A. No sir.

Q. You were living in what is called a work train car provided for the employees?

A. Yes sir.

Witness excused.

Dr. O. D. PLATT, a witness on the part of the plaintiff was called and being duly sworn, testified as follows, on examination.

By Mr. Gray:

Q. State your name, residence and occupation?

A. O. D. Platt, St. Maries.

Q. What is your business or profession?

A. Practicing medicine.

Q. Are you connected in any way with the Milwaukee Railway, or in private practice?

A. Private practice.

Q. You operate a hospital up there?

A. Yes sir.

Q. Where were you educated for your profession?

A. University of Nebraska.

Q. How many years have you practiced all together?

A. Fourteen years.

Q. How long have you been practicing at St. Maries, Doctor?

A. Six years and a half.

Q. During that time have you had considerable experience in treating persons who have been injured violently in accidents and so forth?

A. Yes sir.

Q. Are you acquainted with Mr. Kinzell?

A. Yes sir.

Q. Did you ever treat him?

A. Yes.

Q. What was the first date upon which you saw him?

128 A. February 27th, 1915, I believe.

Q. Where did you see him?

A. At my hospital.

Q. At St. Maries?

A. Yes sir.

Q. Brought there was he?

A. Yes.

Q. Did you make an examination of him at that time?

A. Yes.

Q. State to the jury what the condition was, what you found from your examination?

A. Well, his body, on examination his right shoulder was injured quite extensively. It was black and blue down to the fore arm and very much swollen and also on the back——

Q. This was on the 27th?

A. Yes.

Q. Just go ahead Doctor?

A. On examination you could not determine at that time very well, but found out there had been a fracture of the scapula and he had quite and extensive injury around the rectum.

Q. Just describe that injury?

A. Well, it was on the left side muscle, it extended from the external sphingster muscle to four inches, I think four and a half, and



this flap was torn out from there, was hanging down about four inches long.

Q. What did that flap consist of?

A. It consisted of muscle fibre and of the external sphingster.

Q. About four inches, you say?

A. Yes sir.

Q. What was his condition?

A. Well, it extended posterior to the rectum where this flap started out, there was a hole punched out about two and a half inches deep extending posterior to the rectum past the tip of the coccyx or tail bone.

Q. That is the bone that is at the end of the spine?

A. Yes sir.

Q. What was the condition of this hole you say was two and a half inches long extending up there?

A. There was an infection of the penetrating wound and also the tear.

Q. Was there any pus in there?

A. Yes, it was full of pus.

Q. Was there any way for it to discharge; how did you get the pus out?

A. Put drainage in there.

Q. Was the pus dammed in there?

129 A. Yes sir.

Q. How about this piece of muscle or flap? What was its condition?

A. It was suppurating too.

Q. By suppurating what do you mean?

A. Pus all over the flap.

Q. Was there any foreign matter in there that you observed?

A. It was full of dirt and *fætus*, bowel movement.

Q. Was there any *stuffing* of this muscle there?

A. Yes sir. The whole surface was *stuffing*.

Q. How about round his hip and back outside of that?

A. He had severe contusions about the hips and black and blue at both hips.

Q. How long did he remain there under treatment?

A. He was in the hospital until about the 10th of April. Then I took care of him after that until about the middle of May.

Q. Did you get rid of the infection, doctor?—Doctor, these joints, the hip joint and shoulder joint, was there any interference of motion there?

A. The shoulder he could not move at all.

Q. Now then, will you describe—Did this injury to the rectum have any influence or did it affect his passage or bowel movement?

A. Yes. After his bowels got opened up, he never was sure when they were going to move and it was involuntary on his part. They would move at times when he did not know they were going to.

Q. During the time he was in your hospital state whether or not

he was in pain or suffered pain from these various wounds you have described?

A. He suffered quite severely the first two or three days, but after we got that infection drained out and his temperature went down he did not have so much trouble.

Cross-examination, Dr. O. D. PLATT.

By Mr. Korte:

Q. The suffering then was largely due to infection, was it not?

A. The suffering about the rectum was all due to infection. He did complain quite a good deal of his shoulder.

Mr. Korte: I move to strike the Doctor's testimony with reference to suffering as it now appears on cross examination it was largely due to infection and not to the injury.

Motion denied.

Q. The wound you said was four inches. You meant the length of the wound, of the broken skin?

A. The skin extended from the external sphingster about  
130 four inches, that is down about four inches, a flap about the size of my hand.

Q. The flap was four inches?

A. The flap was four inches.

Q. That is all healed up round it?

A. Yes sir.

Q. The outer part is in perfect condition at this time?

A. I should say so, yes.

Q. Is that flap there or is that healed up?

A. That flap is healed up but the external sphingster is pretty bad. You can stick four or five fingers up his rectum without any trouble; without him flinching.

Q. Did you examine him since that time, since he left the hospital?

A. Yes; examined him two or three times.

Mr. Gray: I object to that as not proper cross examination.

Q. How many times?

The Court: I sustain the objection.

Q. Have you seen him since?

A. Yes sir.

Q. When was the last time you saw him?

Mr. Gray: Same objection.

The Court: Objection sustained.

Q. How long did you treat him?

A. Treated him from the 27th of February to the middle of May.

Q. Given him any treatments since that?

A. Yes he has come to my office several times since that.

Q. I will ask you when was the last time you treated him?

Mr. Gray: I object to that as not proper cross examination.

The Court: The objection is sustained.

Q. What was his condition the last time you looked at him?

Mr. Gray: The same objection.

The Court: That period of time at which he was not interrogated on direct examination. The objection will be sustained.

Mr. Korte: I don't want to take issue with Your Honor's ruling but I do not understand it. Your ruling is that I am limited to the particular time he has inquired about?

The Court: If you want to make this man your own witness—

Mr. Korte: No. I want to cross examine him.

The Court: I uphold the limitation as to direct examination. As to the injury in the rectum, I think the direct examination tended to show the injury was continuing; that I cannot limit the time. You can inquire about that.

Q. How long, Doctor, did the condition you have described continue? Has that continued down to the last time you saw him?

131 A. What condition?

Q. The condition of the shoulder?

A. The condition of his shoulder has become more improved—

Mr. Gray: I object to that as not proper cross-examination. Counsel heard Your Honor's ruling on that.

Mr. Korte: I am trying to conform to it.

The Court: No. I said you could cross-examine as to the condition of the rectum for such time as he observed him.

Q. When did he leave the hospital?

A. He left there about the 10th of April, 1915.

Q. Then I presume he went to his home at Lavista?

A. No. He stayed right back of the hospital there.

Q. You treated him then to what extent? While he was there at St. Maries?

A. Yes sir.

Q. How long did you continue that treatment?

A. Until the middle of May.

Q. Then you stopped treating him all together did you?

A. Well, he was up to the office afterwards for treatment for one thing and another, his shoulder—

Q. What was his condition then?

Mr. Gray: I object to it, not proper cross-examination.

The Court: I overrule that objection.

Q. What was his condition then as to being able to walk and use the arm?

A. The arm was very much—there was ankolosis at the deltoid muscle.

Q. He was able to walk was he?

A. Yes. He was able to walk without a cane or crutch.

Q. You used to know Kinzell back in Dakota didn't you?

A. No sir.

Q. Were you at one time his family physician?

A. No sir, not his.

Q. His wife's family physician?

A. I met his wife once in Dakota; never met Kinzell till he came to the hospital. I knew his father and mother there.

Witness excused.

Dr. JOHN H. SHEPHERD, resumed the stand and testified as follows, on examination.

By Mr. Gray:

Q. Have you the dates at which you examined Mr. Kinzell?

A. Yes sir.

Q. When were they?

A. Third of May, 1915; on the 2nd of February, 1916, and the latter part of May, I have not the exact date of that; and on last Sunday.

132 Q. That would be the 29th?

A. Yes.

Q. 29th. Referring to your first examination of Mr. Kinzell,—did you make a careful and thorough examination of him on each occasion?

A. I did.

Q. Referring now to your first examination please state to the jury what you found with reference to his condition there and, as far as you can, just explain to them in language that can be understood, that we can all understand?

A. The first examination was on the 3rd day of May, 1915, at my office in Cœur d'Alene. Mr. Kinzell walked into the office with a cane. He was using a cane. After questioning him in regard to the manner in which he was hurt and where he was injured on his body, I had him remove all his clothing—I knew at the time that I was making the examination for a report to Mr. Keeton at St. Maries. Mr. Keeton sent him to me. So I started at the top of his head and examined him thoroughly to the bottom of his feet.

Upon having him remove his clothing, the first thing that attracted my attention was the withering of the right shoulder. It was very apparent as soon as the undershirt was removed, that his right shoulder was smaller than his left. He held his right arm in an unnatural position and the skin of the right hand had a little different tinge than the skin of the left. He stood with his left knee slightly bent, in a position of favoring the left side, left leg. I then asked him to—I examined the head and found nothing upon the scalp, face or neck, anything abnormal.

I then asked him to move his arms. He was unable to move the right arm laterally from his body in abduction, more than ten degrees. By moving in an anterior and posterior direction, as in reach-

ing out to shake hands, or putting it back of him, he apparently had almost normal motion, but the motion was slow.

I then took hold of his arm to determine the motion, the motion I was able to make of his arm. I was able to bring the arm from the body about approximately twenty degrees before he commenced to complain of considerable pain. Every time, every attempt—Upon attempting to raise the arm away from the body in a lateral direction, the muscles of the chest and back would spasm and he complained of pain. I was unable to raise his arm from the body over forty-five degrees; in this position, here. (Indicating.)

Q. What did this spasm of the muscles prove to you, Doctor.

A. That the motions which I was performing on him was causing him pain.

Q. That was irrespective of anything he said?

133

A. Absolutely.

Q. All right. Go ahead.

A. I then examined the fore arm. The temperature of the fore arm and hand, that is the sense of warmth of the forearm and the hand of the right—I should say of the right was less than the left. The hand and forearm was cold. There was some interference of the circulation in the forearm and the hand. It had a bluer tinge, and upon pressing it with the finger it would leave a white mark and come back and leave a purple tinge, showing there was some interference with the return flow of the blood from the hand and arm.

I then tested the grip of the two hands and the grip in the right arm was a fraction over half of what it was in the right arm.

Q. Have you instruments with which to determine that?

A. I have.

Q. Does the individual know how hard he is gripping?

A. No, he does not.

Q. Describe the instrument you used for that?

A. The instrument is a double curved of metal and it works in connection with a double elliptic spring, and in the center is a dial and by pressing on this arrangement for that purpose this dial moves round and registers the amount of pressure that has been exerted upon the instrument. In using that on a normal hand where the patient is being fair with you, he will develop what is called the fatigue curve; that is, from repeated, frequent applications of his grip on this instrument the grip gradually lessens; in other words the muscle tires. If a man is trying to play crooked with you and exerts only a portion of the strength which he really has in that arm, he will exert a strength we will say of five pounds, and the next time may be seven pounds, and the next time four pounds. In other words, it is impossible for the man to grip the exact strength each time unless he is gripping to his utmost.

Q. What did you determine from this investigation and examination with reference to the strength of the arm?

A. Well, I had no way of determining the strength of the muscles in the arm, definitely, but the muscles of the fore arm, the grip muscles were just a fraction over half as strong as they were in the other hand.

I then examined the reflexes in the arm. Now by the reflexes, I mean, there are certain places you strike the muscle and get a contraction; that is if you strike a certain place here, this will come up showing contraction of the muscles in the different places.

The deltoid muscle, that is the shoulder-cap muscle, which  
134 snowed a very marked degree of atrophy or wasting, its reflexes were absent. The reflexes of the other muscles were apparently normal.

Q. What was the cause of that?

A. An injury to the nerve that supplies the deltoid muscle, a paralysis of the circumflex nerve.

Q. If there is paralysis of the nerve of that muscle or any other, what is the value of the muscle?

A. The muscle is of no value so long as the paralysis exists and the muscle will waste. If the nerve regenerates in the future the tone of the muscle will come back under proper treatment and time.

Q. Now before we leave that, what period of time would it require—withdraw that—if there was to be an improvement in the condition of that nerve, within what period of time would it be shown?

A. The improvement would show within twelve to fifteen months. Ordinarily improvement will begin to show in about six to ten months.

Q. If it is not shown within that time, Doctor, what in your judgment is the character of the injury as to being permanent or otherwise?

A. It is a permanent injury. If the nerve does not show sense of life within fifteen months it is highly improbable that it ever will.

Q. In other words, it is permanent paralysis of that muscle?

A. Yes.

Mr. Korte: As I understand the last answer, did you find permanent paralysis of that muscle?

(Question and answer read.)

Mr. Korte: You were speaking generally?

Mr. Gray: When you come to your cross-examination of him you can find that out.

Q. Proceed Doctor.

A. In examining the shoulder blade there was considerable tenderness on deep pressure there and working of the shoulder blade. I later had—I made an X-ray plate of the shoulder and I thought it showed that the neck of the shoulder blade had been fractured.

Q. Have you the plate here?

A. No. The plate to which I refer at this time, that plate I unfortunately broke. But I have a plate that we took Sunday that shows distinctly an old fracture of the neck and shoulder blade.

Q. Will you trace the condition of this shoulder and of this muscle, the upper arm and of the entire right arm as you have  
135 found it in your several examinations extending up to last Sunday and, in doing that you can use the X-ray plate and present the matter in your own way?



A. The next time I saw Mr. Kinzell, was on the 2nd of February, 1916. This first examination I have been detailing was on the 3rd of May. At the examination on February 2nd, the shoulder, the general appearance showed nothing particularly different than it did on the first. If anything, there was more wasting of the muscle than there was upon my first examination, but the arc of motion, that is the amount of motion which Mr. Kinzell was able to make of his shoulder and, also, the amount of motion I was able to make by forcible moving of the shoulder was less than it was on my first examination, although there was still a fair amount of motion in the shoulder joint. The pain which he complained of and which I knew was there without having to accept his word for it, because of the spasm of the muscles, was practically the same as on my first examination, when I examined him in May, the condition was about the same with a little, slight decrease in the range of motion of the shoulder joint. But when I examined him Sunday last the field or arc through which I could move the arm was still more restricted.

I have the X-ray plate of that shoulder here.

(The X-ray machine was produced and set up before the jury and the witness stands up before the machine.)

Q. Before you proceed you better produce the plate and have it marked. Where was that taken?

A. They were taken under my observation, in my presence. Dr. Will O'Shea took that plate in my presence.

X-ray plate marked for identification, Plaintiff's Exhibit "B," and was put in the machine.

A. The condition presented here which is responsible, in my opinion, for this restriction of motion, is shown distinctly by this little shadow which is a bony outgrowth of the lower part of the shoulder socket, the glenoid cavity.

Q. That is the limitation of motion of the shoulder joint?

A. Yes sir. With the distinct portrayal of this bony outgrowth, there is unquestionably other outgrowths around the socket of the shoulder joint which are not of sufficient density to produce a shadow. This is the condition which we find in these cases. It also shows an abnormal line going through here, which is the exact location of the fracture which the plate that I took and unfortunately broke some-time ago, showed. It is very indistinct on this plate and, unless I had seen the line of fracture on the previous plate, I would have probably overlooked it here. I could not censure any one for overlooking it not knowing the conditions existing there. But

136 this bony outgrowth shown here is very plain and self evident and is larger at this time than it was when I X-rayed him before, and that is on account of the bony outgrowth around the shoulder socket that may have been responsible for the decrease of the range of motion in the shoulder joint.



(Witness goes back and sits down in the witness chair.)

Q. Is that condition, in your judgment, a permanent condition of this man?

A. It is permanent unless relieved by surgical means.

Q. What are the probabilities of improvement or relief by surgery?

A. The prospect is not very favorable, although there are some men who report very good success by operating in this type of cases.

Q. In your judgment is that a permanent injury and limitation of motion of the shoulder joint?

A. Yes sir.

Q. Now with reference to the muscle; has that anything to do with this deltoid muscle?

A. No. It has nothing to do with the deltoid muscle at all.

Q. From your several examinations of Mr. Kinzell your experience, what is the fact as to whether or not that deltoid muscle, which is the muscle you have described, is permanently paralyzed?

A. In my opinion it is permanently paralyzed.

Q. Will you give your reasons?

A. On account of the length of time that has elapsed since the injury and no evidence of improvement, together with the type of injury to the shoulder joint, which was in my opinion the cause of the injury to this nerve that supplies the muscle and through the injury to the nerve the muscle is paralyzed.

Q. Where does that nerve run that—

A. It branches off from the nerves, nerve fibre, and circles around the head of the shoulder blade in such a manner that it is injured by this type of injury.

Q. Is there any method you know of by which you can operate on the nerve and fix it up, Doctor?

A. It has been done successfully in some cases and unsuccessfully in more.

Q. In your judgment is this a case that could be improved by such treatment?

A. I don't think it can.

Q. In your judgment will it improve in the future?

A. Not in my judgment; on the other hand, from what I have seen of the case it is my opinion that the limitation of motion will become more marked as the outgrowth around the socket continues to increase in size.

Q. All right. Now Doctor, proceed from the shoulder.

A. In examining his back there was considerable limitation in motion in the lower dorsal which is just at the lower portion of the ribs, and in the lumbar region, which is the small of the back. And I determined that by having him stand up and move his body backward and forward and laterally. There was also considerable pain from depression in this region. This condition is somewhat improved during the time I first saw him, but there is still some re-

striction of motion in that area. There is also pain upon impression over that portion of the back.

On the left hip or rather on the left buttocks, but it is not really the buttocks, this far round, I will say that the left buttockal region, there is a scar about an inch and a half long. I do not know what caused the scar.

In the fold between the buttocks leading from the anus upward and slightly to the left of the middle line for a distance of approximately three and a quarter or three and a half inches there is a scar which is, in its widest portion, approximately a quarter of an inch wide.

When I examined him on each occasion he was wearing a bandage around the body, with the bandage brought down between the legs and brought up here (indicating) with the cloth held in place by this bandage. And this cloth was soiled with faetal matter, and his person around the area of the anus was quite badly soiled.

Upon examination of the anus—the anus is the outlet of the rectum—I found that the muscles which normally close up the lower end of the rectum, the puckering string what is called the sphingster muscles, I found that these muscles were not performing their function. And without any appreciable effort on my part and without causing him any appreciable pain and without there being any spasm or contraction of these muscles at the mouth of the rectum, I was able to introduce three fingers up to the hand; showing a complete functional destruction, or nonaction of the muscles which control the outlet of the bowels. There was some tenderness over this scar and in this entire region. I then examined his——

Q. Before you leave that. Are you through with that?

A. Yes sir.

Q. In your subsequent examinations has there been any improvement in that condition

A. There has not been any improvement, but on the other hand the, what we call, the tonicity of these muscles, vitality of these muscles, is less now than it was on my first examination.

138 Q. Is that condition which you find there a permanent condition, Doctor, in your judgment?

A. It is.

Q. Why? Give your reason for that opinion.

A. The fact that this was an open, suppurating or pussing wound, with this boring or puss up behind the rectum, there has been added to the original injury of these muscles, the additional injury from the supperation and loss of tissue which always comes with puss formation, and almost complete destruction of these muscles and fascia——

Mr. Korte: I move to strike that out as to that condition being due to puss or supperation, the condition he is in now, as incompetent and as no part of the injury and therefore should be stricken out.

Denied.

Q. Can that be replaced, that muscle?

A. No, it cannot.

Q. What is the effect of that destruction upon his control of the bowels?

A. It seriously interferes with the control of the bowels. And in case the bowels are a little loose or in case of the passage of wind, he has no control over it at all.

Q. Now you were going to the hip I take it?

A. On examining his hip—on my first examination—there was a great deal of tenderness in the entire region. Whenever you would make deep pressure round the hip he would complain of pain and there would be spasm of the muscles. Upon asking him to move his leg, he could bring the knees up forward, that is, flexing the thigh to the abdomen, to a right angle with the abdomen.

Upon asking him to move the leg laterally to the median line of the body, that is to spread his legs apart, he complained of the most pain of any manipulation or any motion which I asked him to do. And the limitation of motion was marked, which at that time I attributed largely to the spasm of the muscles.

I then took an X-ray plate of the hip and found there was boney injury in the area of the hip joint. That plate, together with his shoulder plate that I took, was broken. I have a picture of the hip which was taken Sunday which shows the bone and the boney injury in this region.

On my subsequent examination the ability to have him spread his legs or to spread his legs himself has decreased and he cannot bring his feet as far apart today, neither can I spread them as far as I could upon my original examination.

Q. You may take the X-ray plate if you will and show the jury?

139 (Said X-ray plate was marked for identification, Plaintiff's Exhibit "C," and placed in the machine before the jury.)

Q. Is this Exhibit "C" the hip plate Doctor?

A. It is. (Exhibiting the plate to the jury in the X-ray box.) The most obvious condition which is abnormal in this plate is this boney outgrowth which is shown here in the top part of the hip joint.

Q. What represents bones in that plate?

A. The light substance.

Q. Can you point to that?

A. Here runs the line of the hip bone, right here; then the outgrowth is here.

Q. Where you point now?

A. Yes. There has also been an injury to what is known as the neck of the femur, the leg bone, which has caused a shortening of the neck together with a raising up of this portion, of the upper portion of the shaft or great troc-anteur of the femur.

Q. That is shown at the upper right hand side of the femur bone?

A. Yes sir.

Q. This is the bone extending downward to the bottom here?

A. Yes sir. And in my opinion there has been an impacted fracture of the femur in this case.

Q. What do you mean by an impacted fracture?

A. Where the ends of the bone have been driven in together.

Q. In your opinion, from the several examinations of him, and from the X-ray plates that you have taken, Doctor, state whether or not this injury to the hip and hip joint and bones thereabout, is a permanent injury or otherwise.

A. It is.

Q. In your opinion will it improve in the future?

A. It will not.

Q. What are your reasons for that conclusion, Doctor?

A. On account of the boney outgrowth around the joint cavity which has become more marked as I have had him under observation, and — the history of this case they have continued to become more disabling.

Q. From your examination of Mr. Kinzell and your several examinations of him and, based upon your experience and study, will you tell the jury whether or not a man injured as he has been injured, in your judgment, will in the future be capable of performing manual labor?

A. I do not see how he can perform manual labor with a permanently disabled hip and permanently disabled shoulder and arm.

Q. Will he be able to run an engine with that arm, in your judgment?

140 A. Not with that arm.

Q. Could a man injured as he is in his hip, follow any occupation that required him to be upon his feet?

A. Not for any considerable length of time at once.

Q. By "any considerable length of time" what do you mean?

A. Well, for four or five hours at a time or two or three hours, even, at a time.

Q. What would result by standing on his feet?

A. The pain would affect him so severely that he could not stand it. This question of men working with injuries is largely an individual one, depending on how much pain an individual can stand and still keep on going. Some will stand more pain than others; and for that reason I cannot state just how long he would be able to stand pain.

Q. From standing upon his feet for any length of time, would there be any pain, in your judgment?

A. Yes sir.

Q. Have you tables of mortality, Doctor?

A. No. I haven't them here. I thought I had them in my pocket but I have not.

Mr. Korte: I have one here. (Produced.)

Q. What are tables of mortality?

Mr. Korte: We can agree upon that.

A. The American tables of mortality is a table that has been compiled by insurance companies from a large number of individuals which shows how long the average man at a certain age will live.

Mr. Gray: It is agreed that at the age of 30 they show a life expectancy of 35.33; and at the age of 31, 34.53 years.

Mr. Korte: Yes. It is so agreed.

Cross-examination, Dr. JOHN H. SHEPHERD.

By Mr. Korte:

Q. Of course these life tables are mere approximations or estimates from statistics and figures that certain individuals have made from observations, are they not? It is not a certainty?

A. No, it is not a certainty.

Q. Of course no man knows how long one will live. Did you find any anesthesia of the skin round the shoulder in the region of the deltoid?

A. Yes.

Q. What area?

A. In the area supplied by the circumflex nerve.

Q. How large?

A. Not quite as large as the palm of your hand.

Q. Can you tell me just about where that would be?

141 A. It would be right over the shoulder cap muscle.

Q. Now I presume the condition which you claim you found in the hip, the man would not be able to walk around without the aid of a cane, any distance, would he?

A. What do you mean by "any distance"?

Q. Say for a mile, mile or two miles, or walk generally?

A. Well, as I stated, he will experience pain, and the amount of walking he can do will depend largely upon his ability to continue walking, bearing pain.

Q. He would have to use some instrument such as a cane or crutch to aid him?

A. I think on a test he would be able to walk two or three miles if he was a plucky man, in my opinion he could stand a good deal of pain and still keep going.

Q. He couldn't do that every day, however, could he?

A. No, he could not.

Q. No, I thought not. This condition which you have described in the hip appeared immediately after the injury didn't it?

A. That bony outgrowth round the hip socket would not appear immediately.

Q. How soon would that appear?

A. The growth of this would begin to show up in from about three to six or seven month. They are present before that but the X-ray will not show them because they have not assumed the solid character

of bone that will cast a shadow. They are more of a cartilage nature up to that time.

Q. An X-ray taken six or seven months from this date would show it?

A. From the date of his injury?

Q. No, from this date back, one taken six months ago would show it?

A. Yes.

Q. Now in relation to his shoulder, Doctor. Did you make any examination of the deltoid itself?

A. I did.

Q. What did you do with relation to examination? What kind of an examination did you make?

A. I examined him in regard to the function of the deltoid.

Q. Pardon. You did not understand my question. What did you do in detail?

A. Yes, I understand your question. In examining for the deltoid we raise his arm—The deltoid is the muscle that raises the arm from the body. I then examined the skin over lying the deltoid muscle, with a pin, to determine the area of sensibility, also for the touch sensation by using a few little sprigs of cotton; and also for  
142 temperature sense by the use of two test tubes, one with hot and one with cold water; then after that I tested also with the electrical current to determine the resistance of the muscle to the electrical stimulation.

Q. How many amperes and how many volts did you use?

A. I have forgotten the number of volts I used. I used four mille amperes, if I remember rightly. I used the r-costadt, the number of volts I don't know. I tested in comparison with other muscles with the same current, with the same strength of current.

Q. If there was no paralysis of the circumflex nerve whenever that was applied to a man's arm, the arm would respond to the reaction of the electric current would it?

A. That depends upon the strength of the current and where it is applied.

Q. If applied at the proper place and proper current it would respond?

A. Yes sir.

Q. Of course there would be no paralysis of the circumflex nerve if a man could put his right hand, place it on the top of the left shoulder, voluntarily of course?

A. I would not think it—

Q. Answer yes or no.

A. I can't answer it yes or no.

Q. I ask you whether or not there would be; what is there about that that you—

Mr. Gray: I object to his arguing with the witness.

Q. Go ahead and explain it?

A. If the muscle is completely paralyzed it would be impossible to

place the hand clear over on the shoulder cap on the opposite arm; but if a few of the fibers were present, he might be able to and with the help of the other muscles he might be able to place the hand entirely on the cap of the opposite shoulder.

Q. If the condition of the circumflex nerve is as you claim it is now, can that man take his right hand, place his right hand on the left shoulder voluntarily?

A. No sir, he cannot.

Q. Could he have done that then or not?

A. No.

Q. Or since the injury?

A. No, not since the injury.

Q. Could he, in the condition in which you have found him, have taken his right hand and placed it in the small of the back?

A. Yes.

Q. Just as I have put mine now, voluntarily?

A. Yes sir.

143 Q. How in fact could he get it there?

A. Well the deltoid muscle is one that—the main motion of the deltoid muscle is abduction of the arm.

Q. Of course, you can't carry any weight with the hand, of any consequence?

A. How much?

Q. Well, say 10, 15 or 20 pounds?

A. Well, I don't know whether his grip would enable him to hold that much now. He could not carry it for any considerable length of time. But if his grip would hold it he could pick it up with the motion of his body and the pulling of the other muscles and fascia which hold the shoulder down.

Q. How far out did you say he could extend this arm from the body now?

A. About ten degrees; eight or ten degrees.

Q. He could not get the arm parallel with the body?

A. No.

Q. Ten degrees would be quite close to the body?

A. Yes sir.

Q. He could not of course chop wood with that hand and arm could he?

A. Not to any considerable extent. He could peck away at it.

Q. I am speaking about practical chopping, not chopping with one hand like you and I would do it?

A. Well, I don't know. He might do as well as either you or I would at that.

Q. I believe you answered he could not continue to walk on the hip and make use of the hip——

A. No, he could not.

Q. And that condition has existed from the time of the injuries?

A. Yes.



Redirect examination, Dr. JOHN H. SHEPHERD.

By Mr. Gray:

Q. In your examinations of him has that condition been progressive, Doctor?

A. Which condition do you refer to?

Q. Of his hip; has it grown worse?

A. Yes, it has.

Q. Has his ability to walk or stand on it become less as time has gone on?

A. His ability to stand on it I cannot say has become less, but the ability of motion in the hip and ability of walking has decreased.

Mr. Korte: Of course as far as the fracture itself is concerned, the fracture has not grown worse?

144 A. No. The fracture has not grown worse but whether the fracture has improved at this time or not is problematical. The time is pretty near up.

Witness excused.

Dr. H. P. MARSHALL, a witness on the part of the plaintiff was called, and being duly sworn, testified as follows on examination:

By Mr. Gray:

Q. State your name, residence and profession?

A. H. P. Marshall, Spokane, Washington, physician and surgeon.

Q. Where were you educated for the practice of your profession?

A. Harvard university.

Q. What experience have you had in the practice of your profession? How many years and where?

A. I have had twelve years' experience; one year in the hospital in Boston; three years in Pullman, Washington; fourteen months in Europe, and seven years in Spokane now.

Q. Fourteen months in Europe. What were you doing there?

A. Studying round various clinics; spent eight months in Vienna, Austria.

Q. Have you had occasion to examine individuals who have suffered violent injuries?

A. A great many.

Q. Are you acquainted with Mr. Kinzell the plaintiff?

A. Simply by examining him last Sunday.

Q. Did you make a careful examination of him last Sunday?

A. Made a complete examination from head to foot, and had these X-ray pictures taken.

Q. By "these" you refer to—

A. —These two that Dr. Shepherd exhibited here.

Q. They were taken in your presence?

A. They were taken in my presence, that is, by Dr. William O'Shea, in presence of Dr. Shepherd and myself.

Q. Will you state in your own way without any questions, Doctor, what you found in your examination of this man, the condition which you found as to any injuries which he had apparently received and whether or not his condition in which he now is is permanent or otherwise?

A. He has paralysis of this big muscle (indicating) called the deltoid. He has an injury to the shoulder joint which makes it impossible for him to raise his arm more than about 15 degrees from the body. He has an injury to the left hip which has the effect of some restriction of motion in that joint; and in addition to these three, he has this injury to the puckering string, what we  
145 call the sphincter or anus, which keeps back gas and faeces until one voluntarily ejects it. Those are the four conditions from which he is suffering. As I see it the injury to the shoulder and the hip and the deltoid muscle are incapacitating ones in the sense of making it impossible for him to do labor. Of course, in addition, he has this thing from which he must suffer continual anguish, namely, not being able to control his bowels, rendering him in bad shape to meet with people especially in hot weather. Besides the incapacitating conditions, he has this intolerable condition.

Q. Taking into consideration the injury to the shoulder, what did you find there?

A. I found he had paralysis of the deltoid muscle which made it impossible for him to raise his arm from the body over fifteen degrees, I say roughly—I didn't measure it—fifteen degrees; that is fifteen degrees of the normal arc.

This injury to the circumflex nerve——

Q. What has that to do with the deltoid muscle?

A. It is its motor. The muscle divorced from its motor is valueless. The muscle has been injured, or there has been some injury there which has interfered with the motor of this muscle. You may have an automobile which is perfect except the engine and without the engine or the motor the automobile will not go. The nerve is to the muscle what the engine is to the automobile.

Q. How are you able to determine that he had that condition?

A. Of course the first thing that causes you to determine that is itself a very obvious one. You can see shrinking of the muscle.

Q. Can you show that to the jury, Doctor?

A. Yes, I think so.

Mr. Gray: Come right up here Mr. Kinzell. You will have to take off your coat and shirt and show it to the jury.

(The plaintiff comes up and takes off his coat and shirt and stands up before the jury and the Doctor shows his arm to the jury.)

A. It is a pretty obvious one. One can see it through the shirt. One can see it even through the shirt, the difference between the right shoulder and left shoulder. You can see the difference between the two shoulders; the prominence of this—You feel of it and see, this one has a considerable bed of muscle over it, while this one

is right down onto the bone. One can see the difference between the two; especially to a Doctor it is very plain.

Mr. Korte: Just have him stand up square on both feet.

A. When he stands up straight, it is very prominent, you can see.

146 Mr. Gray: All right. You can put on your clothes now.  
(Plaintiff retires.)

Q. Now Doctor, taking into consideration the fact that the man was injured in February, 1915, in your opinion will there be any improvement in this condition as far as that muscle and nerve are concerned?

A. There will be no improvement, no. It is a chronic condition.

Q. Can you tell what was the cause of this, an injury to the deltoid muscle or nerve?

A. No one can tell. It might have been a tearing or impairing of the nerve, one cannot determine that. But you can determine there has been an injury to the shoulder itself. It is depicted in the X-ray picture. There is an injury either to the nerve direct or to the bone; it has got to be one or the other; which one of the two I could not tell.

Q. Is that the result of some physical force exerted against—

A. Yes, it is the direct result of an injury.

Q. Now the condition of the shoulder joint and the condition you found there?

A. Well, he has had a fracture in that and in addition to that fracture and as part of the fracture he has a boney outgrowth round the socket that we call the glenoid socket, which is this socket here (indicating) which simply interferes with the motion so he has motion of approximately about 15 degrees of the normal.

Q. Are you able by the X-ray to observe and determine the amount of injury and where it was?

A. You can determine in this way from the effect of it that we see is there. We also know that in injuries to a joint there is very liable to be and in fact is in a very large percentage of cases an outgrowth not observable in the X-ray picture. In other words before the boney structure becomes absolute bone and has enough calcium in it. When one moves the joint they get abnormal sound and feeling in there, showing there is an abnormal interference with the normal range of motion. In addition to this paralyzed condition the paralysis, we have this condition in the joint itself.

Q. Is that a permanent injury?

A. It is absolutely permanent.

Q. What effect upon the ability of this man to use the arm for work has it?

A. Well, the fact that he has these two conditions and the fact that he has in addition an interference with the circulation of the fore arm, I should say the arm was not useable for work.

147 Q. You had not mentioned the circulation before. What did you observe with reference to that?

A. He has a marked colling of the hand and some blueness, one hand is cold and the circulation is not good. When you press on the skin the mark will stay there for quite a considerable length of time, which is *evident* of poor circulation, which would be explained by the injury around it.

Q. Now getting down to the hip? What was the condition there?

A. In the hip he has this injury to the neck of the femur, which might be a fracture and in fact looks as though it were an impacted fracture. In other words he has an injury to the neck of his femur, what is called the great trochanter, which is the end of this large bone, this bone round here (indicating). Then on up here is what is called the acetabulum which is the socket for this bone, the great trochanter fits into that socket, and there is interference in that.

Q. Can you determine the extent of a fracture in that socket from the X-ray?

A. Yes. It shows very marked there. There may be more than is shown, more outgrowth and, indeed, probably is. To give an illustration, we find certain joints are absolutely stiff and still they don't show in the X-ray, we know that because we find it in other cases.

Q. Does not show in the X-ray?

A. Does not show in the X-ray. In other words, if one were to dissect that joint he would find there what the X-ray showed and he would also find fibers possible inside and outside the joint. The X-ray only shows what has sufficient calcium salts in it to show in the X-ray.

Q. In your judgment is that a permanent injury?

A. It is a permanent injury, yes.

Q. Is that one which, in your judgment, will improve in the future or will it become worse?

A. It will not improve and it will probably become worse.

Q. What effect in your judgment, has that upon the ability of this man to use that leg or stand upon it?

A. He cannot, in my opinion, continuously stand on it to work; and that alone, without the arm, would incapacitate him for work. There's another thing I forgot to mention, that is, something which is common and usual in a change of weather. He suffers rheumatic pains and will be affected as a rheumatic is with the change of weather and he cannot stand as much work under those conditions as a normal man. He would have a tendency with more exercise  
148 of that joint to have this pain even in good weather, which he does now, but I mean an increase of that.

Q. Are you able to determine from the shoulder and this hip, irrespective of what he may say, that he has pain there?

A. I am able to determine. He has muscle spasms. I will say I am able to determine it because there is marked muscular spasms.

Q. Now coming to the rectum injury. What is the fact about this injury to the rectum?

A. Taking the entire history into consideration, the fact of this flap that they put drainage into and up through the muscle and that there was deep supperation in that muscle and in addition to the in-

jury to the sphingster muscle there has been a direct injury to the—

Mr. Korte: I object to his testifying to something some other Doctor has found.

Mr. Gray: I withdraw the question.

Q. Assuming that this man was injured by being thrown off a car and that a bolt caught him in the anus or rectum and tore him there and extended for some distance into his flesh; that something like eleven days afterwards the physician examining him found an injury or wound extending up into the muscle and up on beyond the coccyx a distance of two and a half inches; found puss was there and in addition thereto a flap of the muscle and skin was laid open for a distance of about four inches from the anus, and that there was supperation of that muscle; and add to that your examination of him on last Sunday, of the plaintiff, will you just state, in your judgment, what you found on the plaintiff so far as that injury is concerned and ask you whether or not it is permanent or otherwise?

Mr. Korte: I object to that as being speculative and not determining facts upon which an opinion can be based by the Doctor as giving now an opinion of what some other Doctor had found and not from his own examination; an opinion of some other Doctor upon which he cannot be questioned.

The Court: I overrule the objection; giving an opinion upon what has been shown in the testimony as the condition and asking in addition to that hypothetical question, the result of his own examination.

Q. Taking the history of the case.

The Court: I overrule the objection.

A. I should say that there was an incurable condition there from which no improvement could be expected. As far as getting worse is concerned, it can't very much. It will not keep back the air or fæces which is the function of the organ and it is thrown out of condition.

149 Dr. H. P. MARSHALL.

Cross-examination.

By Mr. Korte:

Q. Of course this condition which you say is present now Doctor, has continued from the time of the injury, has it not, as far as the arm is concerned?

A. Not necessarily. It is not necessary if the injury tended to develop the condition, when it occurred.

Q. But if there is activity of the muscle from six to eight weeks after the injury what would you say to that?

A. That would have absolutely nothing to do with it.

Q. If the deltoid was active six or eight weeks afterwards would it not be active now?

A. No, it would probably not be. I said there was a paralysis of the motor of this muscle, what's called the circumflex nerve. If there was a tearing of the circumflex nerve at the time he was injured he would have had paralysis then. But I said as far as the causative factor was concerned that whether it was an injury to the bone or the circumflex nerve that caused it, I could not tell, but there might be an injury there, the causative factor, such that this might not take place for a year afterwards.

Q. You said if the deltoid was active six or eight weeks afterwards it didn't amount to anything?

A. No, I did not. I said if there was activity of the muscle that would have nothing to do with it.

Q. Could he have placed his right hand on his left shoulder at any time in his history since the injury?

A. Yes, at one period.

Q. What period would that be?

A. That would be the period before these boney outgrowths had taken place.

Q. How long after the accident?

A. I couldn't state the time; that would be different with different people.

Q. Approximately give it?

A. No, no, I can't do that.

Q. You can't tell it?

A. No. There's such a wide range of possibilities.

Q. Could he swing his arm out parallel with his body?

A. With partial paralysis.

Q. With the condition you find there now?

A. No, he could not.

Witness excused.

HYRUM S. LEE, witness for the Plaintiff recalled and testified as follows, on examination.

By Mr. Gray:

150 Q. You were asked by defendant's counsel if that was your signature to defendant's Exhibit No. 1 and you said it was. You were then asked if you wrote the letter.

Mr. Korte: Pardon me. I did not ask that question, or claim the letter part was in his hand writing.

Q. Who wrote the letter?

A. Mike O'Shannessy.

Q. Now who is Mr. O'Shannessy?

A. Why he was over the outfit there, I think, as assistant train master.

Mr. Korte: I move to strike out the answer as a conclusion, incompetent, not binding upon the defendant.



The Court: Motion is denied.

Q. Where did he get the information that he put in the report that was sent in? Do you know? Did you talk it over?

A. Yes sir, I did.

Q. Will you state what you said to him in substance?

A. Well he wanted to know, he said there was some mistake made, we wanted to know about how far this man stood from the end of the dozer at the time he was knocked off.

Q. What did you tell him?

A. I told him about three feet.

Q. What about how he was standing, what way he was facing, what did you tell him?

A. I stated just the same that he was facing the east, that he was standing in that exact position and on or about the time they struck he turned and looked over his shoulder.

Q. That's what you told O'Shannessy?

A. Yes sir.

Q. What you told the jury yesterday?

A. Yes sir.

Cross-examination, HYRUM S. LEE.

By Mr. Korte:

Q. You have taken interest in this case have you not?

A. Well, not exactly, no.

Q. Have they agreed to give you any money or any part of any verdict that may be returned in this case?

A. No sir.

Q. You have been with him constantly off and on since he was injured have you not?

A. I have not, no.

Q. Where is this man Balder?

A. Who?

Q. Balder, didn't you say his name was, you mentioned a man that was on the Dozer?

A. I don't know how it is spelled, but I think it is Beltzoler.

151 Q. You don't know where he is?

A. No sir, I don't.

Q. You were working for a while in St. Maries?

A. Yes sir.

Q. Did not Mr. Kinzell and Mr. Keeton get to talk with you?

A. I don't know as they did.

Q. Who did you work for there?

A. At the mill, first.

Q. What mill? There are two of them?

A. Well, it is that west mill, I don't know the name of it, only the man that hired me I think his name was Lee Clark.

Q. Is it the Crowell mill or the St. Maries mill?

A. It is the west mill.

Q. How did you come to go there to work?



Mr. Gray: I think this is immaterial.

The Court: I overrule the objection.

Q. How did you come to go there to work?

A. How did I come to go anywhere's to work? Just naturally went there.

Q. Just answer the question?

A. I just simply went there.

Q. Without anyone asking you?

A. I don't think so.

Q. Did Mr. Kinzell ask you to go there?

A. No sir.

Q. Did Mr. Keeton?

A. No sir.

Witness excused.

Mr. Gray: We rest.

Mr. Korte: I want to make a motion Your Honor.

Thereupon the jury was duly admonished and excused and the following proceedings were had in absence of jury:

Mr. Korte: The defendant moves the Court to withdraw from the consideration of the jury all evidence relating to the failure of the defendant to have upon the rear of said train tail-air-hose, for the reason that there is no proof that the customary and general operation of a dirt train or work train under the circumstances of this case required the use of such appliance or that it was practicable to make use of it under the circumstances; and therefore plaintiff would not be permitted to complain because the fact that there was no tail-air-hose was well known to the plaintiff and he assumed whatever risk of injury there was from the failure of defendant to

have such appliance upon the particular train in question;

152 The defendant further moves that the Court remove from the jury all evidence relating to the last clear chance rule of law which has been pleaded in the complaint in this case, for the reason that there is no proof that the defendant or its employes at the time of the injury actually knew of any peril in which the plaintiff was which could have been avoided by the stopping of the train.

Argued by respective counsel.

The Court: I will deny the motion and I will give you an exception.

Thereupon took recess till 1:30 P. M. today.

Wednesday, November 1st, A. D. 1916, 1:30 o'clock p. m.

At this time, present as before, the jury all being present, the trial of this cause proceeds as follows:

Mr. Gray: I want to reopen my case for a little further testimony.  
The Court: Leave is granted.

*Plaintiff's Case Reopened.*

Mr. Gray: I shall want to refer to the pleadings in argument.

Mr. Korte: I understand the pleadings don't go to the jury.

The Court: The pleadings do not go to the jury.

Mr. Korte: Then I object. There are things in this complaint that have been stricken out.

The Court: The objection is well taken as to the complaint, there might be admissions in the answer that might be pertinent.

Mr. Korte: I have a right to know the parts he offers.

Mr. Gray: I want to refer to the pleadings in argument and so that no objection may be made to that I make the offer if it is proper.

The Court: I think it is proper to offer such parts of the answer as you desire to use.

Mr. Gray: It is the entire answer that I desire to use. I offer the entire answer.

Mr. Korte: We object to it.

The Court: Objection overruled.

Complaint was marked Plaintiff's Exhibit "D" and the Answer, Plaintiff's Exhibit "E."

WILLIAM KINZELL, was recalled and testified as follows, on examination:

By Mr. Gray:

Q. How long before your accident had you worked at this particular bridge? and around there where gravel trains were being used?

153 A. Yes sir.

Q. During what period of time?

A. Well, before this accident.

Q. For what length of time before the accident?

A. Well, a month or so, while we were using the Dozer there?

Q. Have you been around and observed the gravel trains on the road at other places prior to that time?

A. Yes sir.

Q. State what the practice and custom was with reference to equipping trains with tail-air-hose?

Mr. Korte: I ask that it be confined to the particular train and cars, the equipment in question coupled to the Dozer car; unless so confined I object to it as incompetent, irrelevant and immaterial.

Overruled. Defendant excepts.

A. Why, it was the practice to equip them with tail-air-hose, with safety appliance.

Q. Was that true of gravel trains?

Mr. Korte: Same objection unless it was upon the cars involved in this matter.

The Court: Same ruling.

Q. Well such cars as you would have there?

A. Yes sir.

Q. What was the fact with reference to this train having been so equipped when at the particular place you were working on?

A. Both of these trains that was hauling gravel there.

Q. At the time you were injured or some other time?

A. Well, before.

Q. At the time you were injured, you do not know?

A. No, I don't know whether this particular train had one on or not.

Mr. Korte: I move to strike his testimony because of involving conditions, cars and trains and different equipment and different employment, and has no relation to the operations going on at the time and the equipment being used. It is incompetent, irrelevant and immaterial.

The Court: The motion is denied and exception allowed.

Cross-examination, WILLIAM KINZELL.

By Mr. Korte:

Q. That's when you were working the Lidgerwood was it not?

A. Well, they were working the Dozer.

Q. You say you saw tail-air-hose on—used with reference to the Weston Air Dump car?

A. Well sir, I saw tail-air-hose on those two trains.

154 Q. You never saw them operated did you?

A. Yes sir, I did.

Q. When they were loaded?

Objected to as immaterial. Overruled.

Q. Did you ever hear of their operating them when trying to couple onto another car?

A. Well, I seen them operated one time I rode out with them.

Q. Did they use it when they were backing up to the Dozer?

A. They were there for use in emergency cases.

Q. Didn't they use them for a whistle when they were backing up to the Dozer; that's what they used them for, for a whistle for backing up across a crossing?

Mr. Gray: Object to that as not proper cross examination and immaterial.

Overruled.

A. They keep it there for emergency cases.

Q. When the car was loaded?

A. Any time.

Q. Do you mean to say that a man on that dump car could make use of tail-air-hose as quick as a man can signal to the engineer?

A. Why certainly he could.

Q. Where would he be?

A. He would be up there with the air hose.

Q. Where would he get the air hose?

A. I suppose he would get up to where he could get hold of it.

Q. What would he get hold of?

A. Get hold of the handle up there.

Q. How would he get up to the handle on a loaded car?

A. It is fastened to the top of the car.

Q. Where was it fastened to the top of the car?

A. Had a hook up there.

Q. He would have to get down on his belly to reach that air hose?

A. No sir, because you could stoop over.

Q. Would you say that would be good operation for a man to use that air hose when he could stand on top of the load and signal the engineer in plain sight; is that good operation?

A. He could get hold of it, yes.

Q. Answer the question. Is that good operation?

A. It would be in emergency cases.

Q. He would get down here and get hold of the air hose, rather than signal the engineer from the car?

A. Certainly, if he saw he was going to kill somebody.

Witness excused.

Mr. Gray: We rest.

155 Mr. Korte: I renew my motion.

The Court: Motion will be denied.

Mr. Korte: Exception.

Thereupon to sustain the issues upon its part the defendant produced the following:

JOSEPH F. LAKE, a witness on the part of the defendant was called and being duly sworn testified as follows on examination:

By Mr. Korte:

Q. What is your name?

A. Joseph F. Lake.

Q. How old are you?

A. I am 62.

Q. What is your business?

A. Car builder for the Chicago, Milwaukee & St. Paul.

Q. Did you make the model of the Bull Dozer here?

A. I did sir.

Q. From what did you get the measurements to make that model?

A. Off that Bull Dozer X-47.

Q. Is the Bull Dozer made according to scale?

A. It is sir.

Q. What is that scale?

Q. The scale in width and length is an inch and a half to the foot and the main body, that is along the length, is one inch scale. I did that because I didn't want to make in so long. That is the only thing. All this part here is on an inch and a half scale.

Q. What is the size of the brace rod, of the one next to the crank shaft?

A. One inch in diameter.

Q. Point out where the crank shafts are and everything that was upon the Bull Dozer when you measured it?

A. Well this side is the crank shaft but on account of this being so it worked we didn't put that on this side, so this is missing but otherwise the Bull Dozer is just the same I think as I have said on this side and this shows what should be on the other side.

Q. What's the distance from the end of the brace rod as it enters the deck of the car to the end of the car on the end where the crank shaft is?

A. About one foot.

Q. That would be the distance from this rod here, point to it?

A. From here to here.

Q. One foot on the car itself?

156 A. Yes sir.

Q. What are these wings fastened on the side of the car with levers and so forth?

A. There's a casting slides here that hooks on them.

Q. What's the size of the bolt that goes through and fastens these here?

A. That bolt is an inch and a quarter.

Q. What is the car next to the Bull Dozer, what does that represent?

A. That is a Western Air Dump car. That represents a working model.

Q. Is that also built to scale?

A. It is built to inch and a half scale.

Q. Is that correct so far as representing a Western Air Dump car?

A. The only difference is that the truck on that end is not the same. That is a Western Air Dump car truck and this truck on this end is not the same. That's what they call a Bettendorf truck.

Q. You have shown here all the attachments that are upon a Western Air Dump car for the purpose of dumping?

A. Yes sir. That shows all the attachments here on each side of it so you can dump with air.

Cross-examination, JOSEPH F. LAKE.

By Mr. Gray:

Q. How long did it take you to make that?

A. Well, I think it took me about three weeks to make that.

Q. Is there a crank some place up here?

A. There should be a crank the same as this side. That side should be just the same as this. There is a crank shaft in the box but it dropped off; there's a crank shaft on this that works this up and down you see. When you swing this you have to lower that up and down.

Q. Now then what do you call these parts?

A. They are brace rods.

Q. This is the right hand towards the right. A man with his right hand on the brace rod and his left hand on the crank would be facing which way?

A. He would be facing towards the rear of the car on that side.

Redirect examination, JOSEPH F. LAKE.

By Mr. Korte:

Q. This photograph that I hand you represents truly the Bull Dozer, the front end as I have had you describe. I have  
157 had this photograph taken showing the different crank shafts and so forth?

A. Yes sir, that shows, that's a true representation, that's the one I said was complete same as this.

Recross-examination, JOSEPH F. LAKE.

By Mr. Gray:

Q. Show the jury where the tail-air-hose is on the dump car?

A. There is no tail hose on this now. There is train hose to attach to it. That's the way they have for dumping the car.

Q. That is this long one?

A. Yes sir. The tail-air-hose would hook onto that.

Q. Where would that be hooked on the car?

A. I don't see where you could hook it except you would keep a hook out there, a hook on the car.

Q. In other words you would have to loosen the tail-air-hose from the body of the car to dump?

A. It would fall down then and you couldn't use it at all.

A Juror: May I ask one question?

The Court: Yes.

The Juror: Where is a man supposed to stand when he dumps that car?

A. I don't know that. I have not worked on that. I don't know anything about that.

Recross-examination resumed:

Q. What is this long hose?

A. That is for dumping the car.

Q. How do you know they use that for dumping the car?

A. Direct from the engine. The air comes from the engine.

Mr. Korte: He don't know anything about operation.

A. I don't know anything about the operation, only that was made to put on there.

Witness excused.

N. E. SHANNESSEY, a witness on the part of the defendant was called and being duly sworn testified as follows on examination:

By Mr. Korte:

Q. Give your name?

A. N. E. Shannessy.

Q. How old a man are you?

A. 42 years old.

Q. What is your business and what has been your business?

A. Conductor.

Q. How long have you been railroading?

A. 21 years.

Q. During that time what positions have you held in railroading?

158 A. I have been railroad conductor for 16 years and the balance as brakeman.

Q. Do you recollect the time when Mr. Kinzell was hurt?

A. Yes sir.

Q. At that time what position did you hold?

A. I was general foreman of this work they were doing.

Q. Were you on the work the day he was injured?

A. Yes sir.

Q. Where were you at the time he was injured?

A. I was on the engine.

Q. Where, in the cab or on the outside?

A. In the cab sitting on the seat.

Q. How many cars were there in that train moving at the time?

A. 24 cars.

Q. What kind of cars were they?

A. Western Air Dump cars.

Q. Loaded or empty?

A. Loaded.

Q. To what extent were they loaded with reference to the capacity of the car?



A. They were loaded about full.

Q. When you speak with reference to their being loaded about full, show the jury on this model of the Western Dump car about how full it was loaded?

A. Loaded up to that and rounded up just so the dirt would not fall off.

Two photographs marked for identification, Defendant's Exhibits No. 3 and 4 respectively.

Q. Examine Defendant's Exhibit No. 4 and state whether or not the load you were carrying that day was about as represented in that picture?

Mr. Gray: I object to taking a picture of some load some other time; would not be competent. He can describe the load they had on the day of the accident.

Sustained.

Q. What is that a picture of Mr. Shannessy?

A. That's a picture of a Western Air Dump, loaded.

Q. How does that compare with the way you loaded the cars you were hauling on that train that day?

Mr. Gray: I object to that as incompetent, irrelevant and immaterial. He can describe how it was loaded but to take some other car and take a picture of it and show that it was about the same is incompetent.

Mr. Korte: Simply to illustrate the testimony to the jury.

The Court: It will be overruled, taken as an illustration.

159 Q. Illustrates the load on a dump car; is that right?

A. Yes sir.

Q. How many loads—How many yards of earth would be on there, on a Western Air Dump car loaded as you have described it?

A. About 15 yards.

Mr. Korte: I offer in evidence, Defendant's Exhibit No. 4.

Mr. Gray: I object to it as incompetent, irrelevant and immaterial.

Overruled.

Q. You say you were riding in the engine?

A. Yes sir.

Q. Was there or not a caboose on the end of that train?

A. There was not a caboose.

Q. Where were you moving it?

A. From Ewan.

Q. To where?

A. To Bridges 140 and 142.

Q. As you approached these bridges of course you would attach to what you called the Bull Dozer?

A. Yes sir.

Q. I will ask you whether or not you observed the Bull Dozer at any time as you approached it?

A. Yes sir.

Q. When you first saw it how far away were you?

A. We were about three-quarters of a mile.

Q. Was it a straight track?

A. Yes sir. The Bull Dozer was standing on the tangent.

Q. How fast was that train moving when you first saw the Bull Dozer?

A. We were going along about 15 miles an hour when we first saw it.

Q. On which side of bridge 142, the bridge nearest Ewan, were you then moving?

A. We were at the extreme west end of the bridge, on the solid ground approaching the west bridge coming that way.

Q. Was there any reduction made of speed after that?

A. Yes sir, just before we got to the bridge.

Q. Why did you slow down there?

A. Well there was special orders for trains to slow down.

Q. On account of the work that was going on there?

A. Yes sir.

Objected to as leading.

Q. What was the reason for it?—When you passed over that bridge and came near the Bull Dozer and before you coupled onto the Bull Dozer or was coupling onto the Bull Dozer, what if any reduction of speed was made?

160 A. We were slowing right down to couple onto the Bull Dozer as close as we got there.

Q. How fast were you moving when you coupled on the Bull Dozer?

A. Not to exceed four miles an hour.

Q. How do you know?

A. For the simple reason I was there and I know the movement of the train.

Q. Who was giving signals at that time?

A. Brakeman Moody.

Q. Where was he standing on the train?

A. On the leading car, 24 car lengths from the engine.

Q. He was then on the end car?

A. On the end car.

Q. Which way was the engine facing with reference to pushing the train towards the Bull Dozer?

A. She was heading east, heading towards the Bull Dozer.

Q. The engine was then pushing the train ahead of it?

A. Yes sir.

Q. What signals did you see Moody give at first when they slowed and where about was the train at that time with reference to the Bull Dozer when he gave the signal?

A. He gave the four car lengths signal.

Q. Illustrate to the jury the four car signal, how he would do it.

A. It is given in this way (indicating) four times.

Q. Four times?

A. Before he drops his arms.

Q. Yes sir. After he gave the four car signal what was done with reference to slowing down the train?

A. His signal was taken by the engineer and the air was applied and the speed of the train reduced.

Q. How fast were you going when you got that signal?

A. Moving along very slow.

Q. What other signal did you see him give there before or after the train coupled onto the Bull Dozer?

A. I seen him give the emergency stop signal.

Q. When was that with reference to the time you have described?

A. Well, being on the engine it was immediately—It was about the time that the train was stopped, the train was about stopped.

Q. Now Mr. Shannessy what happened after that with reference to Mr. Kinzell being hurt?

A. I got off the engine and went over there.

Q. What was the last signal he gave?

161 A. The emergency stop signal.

Q. Show that to the jury, what kind of a signal he gave then?

A. It is a vicious signal like that (indicating) a couple of them.

Q. You got down off the engine and went where?

A. I went over along the train to where the Dozer was.

Q. When you got there what did you find?

A. I found Mr. Kinzell lying out there on the side of the track.

Q. Injured?

A. Yes sir.

Q. What did you do then? Then what happened? What was done with the train after that?

A. I immediately told Mr. Moody to go down and—

Q. I mean in relation to the dirt train and the Bull Dozer on that day whether they moved or stayed there that day?

A. I took her right then and went to Ewan with it.

Q. How long did it remain there?

A. It remained there just long enough until a freight train and caboose came and picks up the injured man and pulled right out.

Q. Then you came back to Bridge 140 did you?

A. Yes sir.

Q. Did you have the Bull Dozer with you?

A. We put the Bull Dozer on the side track, when we made up the train was uncoupled from the Bull Dozer.

Q. Did you find anything wrong with the Bull Dozer, that is, any damage by reason of the movement of the train against it?

A. No sir.

Q. Was there anything about it that was injured?

A. Not to my knowledge.

Q. Anything about the wings on the side?

Mr. Gray: I object to his cross-examining his own witness.

Overruled.

A. Nothing that I could find with the working conditions of the machine.

Q. In your experience as a railroad man you have seen the cars come together at various speeds have you?

A. Yes sir.

Q. Tell the jury what would be the effect of a train of loaded Western Air Dump cars, twenty-three such as you had there, moving against the Bull Dozer at the rate of 10 miles an hour.

A. Well, at that speed of 10 miles an hour if you would strike this machinery, this wooden constructed machine at the rate of 10 miles an hour, why there would be nothing left of this front end. This there part (indicating on the model) would be broken so we could not use it any more until it could be repaired.

162 Q. How about the wings on the side?

A. They would be jerked right out of this that works them up and down here (indicating).

Q. How about a man standing on the end of the car?

A. Well, there would be no man here to tell anything about it if we had hit that machine at the rate of 10 miles an hour.

Q. You have seen these Western Air Dump Cars operated, such as you were operating there in connection with the Bull Dozer, state to the jury whether or not it is usual or customary to have upon the end car, when you are coupling up to the Bull Dozer, the thing known as a "goose-neck," or tail air hose?

A. No sir, we don't use them at all.

Q. Why don't you use that?

A. For the simple reason there is no place provided on that make of car to carry them.

Q. How would a man have to get on the car, on a loaded car, to operate that, where would he have to stand?

A. I don't know where he would be to operate that tail air hose.

Q. Is there any place where a man can stand with safety and take hold of the tail air hose and operate it?

A. No sir.

Q. Where would be the better place in railroading to give signals to the engineer?

A. On top of the car at the time we were operating it there.

Q. Where would he have to be with reference to the tail air hose if there had been one on there?

A. He would be on top of the load there on top of the car and could not get down to that.

Q. State whether or not he could very readily give signals to his engineer standing on top in plain sight rather than get down to take hold of any tail air hose if there was any on there.

Mr. Gray: I object to that as leading.

The Court: It is leading, but I will allow it.

Q. (Question read.)

Mr. Korte: I will withdraw it.

Q. State whether or not it is a fact that the brakeman in his

position on top of a loaded Western Air Dump car will give signals more readily and with greater safety for everyone connected with the train, by his signals from the top of the load rather than by any tail air hose.

A. Yes sir.

Cross-examination, N. E. SHANNESY.

By Mr. Gray:

Q. You think if they were going ten miles an hour there would have been a worse accident do you?

163 A. Yes sir.

Q. By that you mean a more serious accident to the Bull Dozer?

A. Serious to the bull dozer and anybody that would be standing on it as Mr. Kinzell was.

Q. Now there are speeds at which you make this coupling which are reasonably safe to a man and——

\* A. Oh, no, not at ten miles an hour.

Q. I say there are speeds at which you can make the coupling with safety to a man on the bull dozer?

A. Yes, sir.

Q. There are other speeds which, if a coupling is made at that speed would be unsafe to men on the bull dozer?

A. Yes, sir.

Q. Who else were on the engine with you?

A. The engineer and fireman.

Q. Anyone else?

A. Not that I recollect.

Mr. Korte: You mean inside the cab?

Mr. Gray: On the engine.

Mr. Korte: He asked you if anyone else was there.

A. The conductor was there, and the brakeman.

Q. Where was the brakeman?

A. The brakeman, I don't just recollect where the brakeman was. I think he was outside on the running board, if I remember correctly, just at the time.

Q. Where was the conductor?

A. I think he was outside on the engine.

Witness excused.

OSCAR B. MOODY was called and being duly sworn as a witness on the part of the defendant testified as follows on examination.

By Mr. Korte:

Q. What is your name?

A. Oscar B. Moody.

Q. How old are you?

A. Forty-one.

Q. You are in the employ of the defendant railroad company, are you?

A. Yes, sir.

Q. How long have you been railroading?

A. About seventeen years.

Q. And for this railroad?

A. Well, most of the time.

Q. You were one of the brakemen connected with the work train that is involved in this suit, when Mr. Kinzell was hurt, were you not?

164 A. Yes, sir.

Q. What was your position on the train when the train was moving towards the bull dozer to couple onto it?

A. I was on the head car, east car, moving towards the bull dozer, the further car from the engine.

Q. On what part of the car?

A. I was standing right about the center on the left hand side of the car, looking ahead.

Q. To what extent was the car you were standing on loaded with material? Just show the jury with the model, all about it.

A. It was loaded with all we could get on here and level up so it wouldn't come off over the edges here (indicating).

Q. Was that any higher in the center than on the side boards?

A. Yes, it was higher. It was rounded over in the center.

Q. Where was that train moving from?

A. From Ewan.

Q. It was moving towards where the bull dozer was, near Bridge 140?

A. Yes, sir.

Q. How far from the west end of bridge 140 was the bull dozer standing, if you know?

A. I should judge about six car lengths.

Q. How long are those Western Air Dump cars?

A. Thirty feet.

Q. That would be 180 feet?

A. Something like that.

Q. As you moved out of Ewan and came towards Bridge 142, that is, the first bridge, not the bridge you were going to dump at, how fast were you moving?

A. About 15 miles an hour, coming out of Ewan.

Q. Did you slow down any?

A. Just before we entered onto Bridge 142.

Q. How slow did you cross that bridge?

A. Well, there were special orders for four miles an hour.

Q. How fast were you going at this time?

A. I don't think we were going over four miles an hour.

Mr. Gray: Have you the written order?

Mr. Korte: I will have to ask the trainmaster. We will get it.

Q. You said you slowed down to four miles an hour as you crossed Bridge 142?

A. Yes, sir.

Q. From this bridge to where the bull dozer was—How far was the distance from Bridge 142 to where the bull dozer was, west of 140?

A. Well, it was probably eight car lengths or such a matter.

Q. That is, 240 feet. How far could you see the bull dozer from where you were coming towards it? How far away could it be seen?

A. Close to three quarters of a mile.

Q. As you approached the bull dozer after you had crossed Bridge 142, and had slowed down to four miles an hour, was there any more reduction in the speed of that train before you coupled on the bull dozer?

A. When we come to Bridge 142 we just drifted across there.

Q. Was there any reduction of speed?

A. We slowed down to couple onto the dozer.

Q. Did you give any signals there with reference to slowing down?

A. When about four car lengths from the dozer I gave the engineer the four car signal.

Q. Could you see the engineer?

A. Certainly. It was on a tangent track.

Q. Were you standing up on top of the load or sitting down there?

A. I was standing up.

Q. What signal did you give?

A. Four car signal.

Q. That is, the four motions described by Mr. Shaunnese?

A. (Witness indicates the signals.)

Q. To what extent did you slow down then? Or, was the train slowed down after going four—after giving the four car signal?

A. When I gave that signal the train was slowed down in my judgment so that there would be no damage done by coupling up.

Mr. Gray: I move that be stricken out as not responsive.

The Court: It is stricken out.

Q. How slow was the train going when you coupled onto the dozer?

A. Between three and four miles an hour.

Q. When you were approaching the dozer did you see Kinzell there?

A. I did.

Q. Where was he standing when you got ready to couple onto the dozer?

A. He was standing back towards the center of the dozer. He stepped forward, got down here and shoved this knuckle open with his foot; just after that, after he shoved this knuckle open, he raised up and started back towards the center of the car.

Q. Then did you couple onto it?

A. Just about as he turned and stepped over this rod, we coupled onto the dozer (indicating on the model).



Q. What happened then?

166 A. Mr. Kinzell tipped right over backwards.

Q. Had it been raining?

A. It had been raining all the morning.

Q. What was the condition of the floor of the dozer?

A. It was wet and slippery and muddy.

Q. When this happened what did you do?

A. I gave the full stop signal.

Q. What was done then in regard to stopping of the train, by the engineer?

A. He stopped just as quick as he could.

Q. What application did he make of the braking system on the engine?

A. I suppose he used the emergency brake. Of course I, not being on the engine, could not tell but I supposed that he obeyed my signal and set the emergency brake.

Q. How soon did the train stop after you gave the emergency signal?

A. Just as soon as I saw Mr. Kinzell start to tip over, I gave the signal. I don't think we moved over ten feet.

Q. How do you account for that movement of ten feet if he did set the brake on your signal, that movement of the train of eight or ten feet?

A. There must have been slack in the train.

Q. How much slack is there between each car in the train? Where is the allowance for slack? Point it out to the jury on the model.

A. Right here in this draw bar. This is the draw bar here and back in here there's a spring in here and there's a little play in here (indicating on the model).

Q. How many inches of play is there between the draw bar and the dead wood?

A. From four to six inches.

Q. So there would be from eight to twelve inches play in there between the cars, would there?

A. Something like that.

Q. How many cars did you have in the train?

A. Twenty-four.

Q. As to the application of the emergency, which would be made instantaneously, it would require some moments of time in making it, and having it take effect?

A. It requires some little time from the time I give the signal, and he makes his application and the air takes effect; it requires a little time from the time the air is applied there at the end of the cars as they were moving towards the dozer.

Q. The air is applied from which end of the cars as they were moving towards the dozer? To which car, the one next the engine or next the dozer, would the air be first applied?

167 A. Next the engine.

Q. And it would go along the 23 or 24 cars then?

A. Yes sir.

Q. You have worked in connection with what they call a work train, moving earth and stuff, in connection with railroading, have you?

A. Yes sir.

Q. And during that period of time you have seen the Western Air Dump Cars used?

A. Yes sir.

Q. Is it usual or customary in connection with loaded trains of air dump cars when moving to couple onto a bull dozer, or moving them at all, to use what is known as a goose-neck or tail air hose?

A. No sir.

Q. Why, Mr. Moody, do you say they are not used?

A. There is no place provided for them up here and they are not provided. The company does not furnish them to use on the cars.

Q. Was there or was there not one of those on the train that was moving at that time?

A. There was not.

Q. Had there ever been one on that train to your knowledge?

A. Not to my knowledge, no sir.

Cross-examination, OSCAR B. MOODY

By Mr. Gray:

Q. Now, Mr. Moody, you were the front brakeman, is that what you call it, or rear brakeman?

A. I was the brakeman that was riding the first car. We were shoving it. I was on the east car.

Q. Was that car loaded?

A. Yes sir.

Q. Was it customary to have all the cars in the train loaded?

A. It was on the train there.

Q. Was it ordinarily done, to leave the first car unloaded?

A. No, sir, not on that train in the daytime.

Q. It was your duty to be there so that you could give signals and prevent the train bumping into the dozer too hard?

A. Yes sir.

Q. Upon the proper performance of your duty in that respect, in some measure, at least, depended the safety of the men on the dozer?

A. Why yes, to a certain extent.

Q. In other words, if you were negligent and permitted that train to bump into the dozer too hard, they might be hurt; is that it?

168 A. Why yes, if we hit it too hard.

Q. What were your duties in that respect?

A. My duties were, I was supposed to ride this head end and see that nobody was hurt.

Q. To keep a lookout?

A. Yes, sir; a lookout.

Q. You say at the time the coupling was made that train was running between three and four miles per hour?

A. Yes, sir.

Q. Which was it, three or four miles?

A. Well, between three and four.

Q. You stated that you just drifted over the first bridge; is that right?

A. What I mean——

Q. Just answer.

A. Drifted over the bridge.

Q. And up to the dozer?

A. Yes, sir.

Q. Running three or four miles an hour, you would call that "drifting" is that it?

A. The engine was not working steam; that's what I call drifting.

Q. I asked you if three or four miles an hour would be "drifting"?

A. Certainly.

Q. The car moved how far after you gave that vicious emergency signal?

A. Not over ten feet.

Q. Not over ten feet. You explain, that by saying the slack of the cars ran out that ten feet; is that it?

A. That would be my idea of it.

Q. Was the air connected to all the cars?

A. The air was all connected all the way through from the engine, yes sir.

Q. It was your idea that each car ran out six or eight inches, or whatever it was?

A. Well, they might have moved that ten feet before the air took effect and stopped them.

Q. I will ask you what time it took them to move that ten feet before the air took effect, or the slack of these cars ran out.

A. From the time I gave the signal until it stopped I should judge that car moved ten feet.

Q. From the time you gave the signal?

A. Yes.

Q. Then the air was applied according to your testimony immediately upon your giving the signal?

169 A. I expect it was, me being on this car twenty four car lengths from the engine.

Q. Did the cars back down again toward the engine?

A. No, sir.

Q. You were pushing them up grade there?

A. It was a very slight grade.

Q. And you were on the left hand side of the car going east, I understood you?

A. Just a little to the left of the center.

Q. Somewhere near the middle of the car?

A. About there, I should judge (indicating on the model).

Q. That would be about ten feet from the east end of the car?

A. Just about two-thirds of the way from——

Q. Which way were you looking?

A. Looking towards the east, towards the dozer.

Q. Where was Kinzell when you picked him up?

A. He was lying right out on that side of the track, on the left side of the track. (Indicating.)

Q. How did you get from off that car?

A. Oh, I suppose I climbed over the end here. I don't know. I guess so (indicating on the model).

Q. Off the end towards the dozer?

A. I couldn't say as to that; I suppose I did.

Q. Can't you remember that just as well as you can remember and have described these other things?

Mr. Korte: I object to that as argumentative.

Sustained.

Q. You can't remember how you got down off the car?

A. I might have jumped off the side, or I might have climbed over the end.

Q. You may have jumped off and may have climbed over the end. And where was Kinzell from where you jumped off or climbed over the end?

A. He was lying on the left side of the track.

Q. How far from where you climbed down or jumped off?

A. As I was standing on the car I just looked right down over and saw him lying there by the side of the track.

Q. You saw him lying how far from the side of the track?

A. About four feet.

Q. You think you climbed over the end, and climbed down or jumped from the car?

A. Well, that I couldn't say. I don't know how I got down.

Q. I want you to mark on this dozer where you pretend in your testimony Mr. Kinzell was at the time of the coupling.

A. Well, now, whether he had one foot over this brace bar, or brace, or whether he had both feet over I couldn't say.

170 Q. Just mark about the place where he was and put your initial "M" about the place where he was.

A. (Witness marks on the dozer.)

Q. Have you marked "M" on the dozer?

A. Yes, sir.

Q. You say he went out and fixed the knuckle for the——

A. He stepped forward here and opened that knuckle, got down and shoved it open with his——

Q. Whose business was it to make that coupling?

Mr. Korte: I object to that as not proper cross examination.

Sustained.

Q. You say that there was no tail air hose on the end of this——

A. Not on the train that I was working on.

Q. There was not?

A. No, sir.

Q. At any time?

A. No, sir.

Q. You say there was no place for it?

A. No place provided for it.

Q. What do you mean by that? No place to hook it on top of the car or no place to attach to the air?

A. Not up here (indicating on the model).

Q. There was no hook there; is that the idea?

A. No place to hang it there.

Q. Was there any place to attach it to the air?

A. Certainly, to the air hose.

Q. What is this tail air hose? It is simply a piece of air hose with air valves and handle?

A. Yes, sir.

Q. You simply meant there was no hook or place to hang it on top here (indicating on the model)?

A. That is up on top, no hook on top.

Q. Have you seen any of these cars there in that work so equipped, or other trains?

A. I never noticed, but I think they had one improvised that they had used for a whistle.

Q. On the other train?

A. I think they did, but not sure about it.

Q. They could have used it as a whistle on backing up, and could have used it to set the air?

A. They put it on to use for a whistle.

Q. I say it might have been used to stop the train?

A. Yes, it might have been.

Q. And with a hook that was not provided, and which might have been provided, the brakeman could have walked over and turned that valve on the back end of the car, could he not, and  
171 could have done that if it had been up at the top part of that car, could he not?

A. I would not in this case, though.

Q. But you could do it, could you not? Of course if you were not looking you would not, but if you were you could have done it?

A. I would either had to get down on my knees or sit down or something in order to save myself from falling over.

Q. I suppose in stopping a train suddenly there is always some chances taken in doing that, is there not? In using the tail air hose?

A. In order to get over there to get hold of that, in order to give the emergency as you say, there would have been.

Q. If it had been there the rear brakeman or whatever brakeman you call it could have reached out and could have stopped the train, could he not?

A. Well, he could not have stopped it as quick.

Q. He could have stopped the train within a car length could he not?

A. No, I don't think he could.

Q. He could have stopped the train going as it was then going within a car length?

A. Well, he could make the signal and release it faster than a man could get hold of the air hose.

Q. How far would it have gone?

A. I couldn't tell you.

Q. These air hose are provided for the purpose of stopping the train, are they not?

A. Yes, sir.

Q. Would it be any more difficult to use it to stop the train than it would be to use it to whistle with?

A. To use it to whistle with, there was a little whistle attached to it, is all.

Q. It would not be any harder to get hold of it to whistle with than to stop the train, would it?

A. No, I don't know as it would.

Q. If you got your hands on it, you could do it, you could do either one. You are still working for the Milwaukee Company are you?

A. Yes, sir.

Q. Do you get any extra pay for coming here and testifying?

A. No, sir.

Q. They don't pay you for double time or anything of that kind?

A. I never heard of anything. Our schedule don't call for that.

172 Redirect examination, OSCAR B. MOODY.

By Mr. Korte:

Q. You are paid no special wages in force between the Union and the railroad?

A. No, sir.

Q. And under that you are earning as much as you can if you are operating a train, and your expenses?

A. Yes, sir.

Q. With a railroad's man pay?

A. With the railroad man's pay.

Q. Now, Mr. Moody, what would you have to do with this tail air hose when you coupled to the bulldozer and wanted to attach your air to the bull dozer?

A. We would have to couple the tail air hose on our train line and the air dump, and couple the hose on the dozer on the train line hose and the air dump.

Q. What would become of your tail air hose?

A. Well, it would be hanging there.

Q. It would not be attached to anything, would it?

A. No, sir.

Q. Now, what effect would this tail air hose, when you coupled onto this bull dozer, have upon the man standing upon the car?

A. It didn't have any effect upon me.

Q. In your experience as a brakeman in riding trains, Mr. Moody, tell the jury whether or not the shock, moving at three or four miles an hour, will tip you off your balance if you are not paying attention to your business, and seeing that you are in the right position?

A. If I am standing up backwards it would throw me over, but if I am facing the dozer it would not fease me a bit, because you are standing in this position, your foot out bracing yourself; but backwards it would be very apt to tip you over especially if you are not knowing at just when it was coming.

Witness excused.

Recess ten minutes.

After recess.

N. E. NICHOLLSON called and being duly sworn as a witness on the part of the defendant testified as follows on examination:

By Mr. Korte:

Q. Give your full name?

A. N. E. Nichollson.

Q. Where do you reside?

A. Wallace, Idaho.

Q. What's your business?

A. Northern Pacific roadmaster.

173 Q. How long have you been in the railroad business?

A. Twenty-seven years.

Q. How old a man are you?

A. Forty-eight, a little over.

Q. During that time have you had occasion to know what a bull dozer and the Western Air Dump cars such as these models are?

A. Yes, sir.

Q. State if you have had occasion to come in contact with, and to observe cars when they come together at various rates of speed?

A. Yes, sir.

Q. From your long experience, assuming that a Western Air Dump train consisting of 23 cars loaded, pretty well rounded, twenty-four cars, were moving along a straight track, on a slight grade, at the rate of ten miles an hour, moving against a bull dozer for the purpose of coupling at that rate of speed, what effect would that have upon the bull dozer as to causing damage or not?

A. My opinion is that, at ten miles an hour it would tear it up; break it.

Q. What part would be torn up?

A. Well, what is called the draft gear.

Q. You call the draw bar the draft gear?

A. The draw bar, end connection.

Cross-examination, N. E. NICHOLSON.

By Mr. Gray:

Q. How fast could it go without injury to the bull dozer, in your judgment?

A. Well, twenty-four loads of rock would be very close to one



thousand ton. And I should think that four or five miles an hour would kick it pretty hard.

Q. Three or four miles an hour would be hitting it pretty hard, you think?

A. Yes, about four or five miles an hour would be hitting it pretty hard.

Q. It would not be very safe for men who were on the bull dozer to hit as hard as four miles an hour, would it?

Mr. Korte: I object to that as not proper cross-examination.

Overruled.

A. What was that question?

Q. I say, it would be hitting it pretty hard if you hit it at three or four miles an hour, if there were men on the bull dozer, would it not?

A. Well, I wouldn't say it would be unreasonable.

174 Q. How hard would you have to hit that coupling with two men standing on the bull dozer holding onto these braces, and the crank rod here, in order to break the grip of both of them and knock them down?

Mr. Korte: I object to that as not proper cross-examination.

A. Well, that would be a pretty hard question for a man to answer.

Overruled.

Q. If they hit that hard, it would be hitting it unreasonably hard, in your judgment?

A. At ten miles an hour?

Q. No. If they hit it hard enough so that men holding onto these rods and cranks, that their hold was broken and they were knocked down, it would be hitting it too hard for operation with safety?

A. If they hit it hard enough to break men loose I would say it would be, yes.

Q. And how fast would that train have to be going to do that, in your judgment?

A. Well, it would depend upon how tight a hold, and if he was guarding himself or not.

Q. If he saw it, knew it was coming, and held on as hard as he could, how hard would you have to hit it?

A. Well, I wouldn't hardly know how hard.

Q. How fast would that train have to be traveling to break that kind of a hold?

Mr. Korte: I object to that as not proper cross-examination; argumentative and involving a great many possibilities; the witness is incompetent and has no chance, it is unfair to the witness; depends upon a man's grip, how hard he grips the brace, and all that; not based upon any fact in the case.

Mr. Gray: This man has been put on here as an expert.

Overruled.

Q. Go on and answer that question as well as you can, Mr. Nicholson.

A. Well, if going four or five miles an hour would be a condition I might——

Q. Well, assuming that 24 loads were going four or five miles an hour it would be fast enough to hit the dozer hard enough to break those grips?

Mr. Korte: I object to that as not proper cross-examination.

Overruled.

A. Well, that would depend altogether upon the position he is standing in.

Q. All right. Now let us assume that two men are on the dozer, one holding on with his right hand to the brace rod, and  
175 his left hand on the crank here, and the other on the other side, holding onto the rod, and at the time this dozer was struck their hold was broken and they were thrown down, tell us how fast that train would have to be going in order to hit it hard enough to break those men's holds?

Mr. Korte: I object to that as not proper cross examination.

The Court: The objection is overruled. You can answer that question.

Q. Give your best judgment.

A. Well, I should say between four and five——

Q. —Miles per hour?

A. Four miles an hour——

Mr. Korte: What was your answer, Mr. Nicholson?

A. Four or five miles an hour.

Witness excused.

MICHAEL MCGRAW was called and being duly sworn as a witness on the part of the defendant testified as follows:

Direct examination.

By Mr. Korte:

Q. Give your full name.

A. Michael McGraw.

Q. How old are you?

A. Forty-eight years old.

Q. What has been your business?

A. A railroad man.

Q. Following railroading?

A. Yes, sir.

Q. Were you on the work the day Mr. Kinzel was injured?

A. Yes, sir.

Q. Where were you standing at the time that the work train moving toward the dozer was about to couple onto it, how far from the dozer?

A. This is the location pretty good, right here, and about in there, now I was on this side of the train going along this way (indicating on the model).

Q. How many car lengths from the dozer at that time?

A. I got right about up to it. I was in between here and here. (Indicating on the model of the car.)

Q. Between what cars were you?

A. I was going right up by this end in here.

Q. What is that?

A. This is the dozer.

Q. You were between the end car and the dozer that they was to couple to?

A. Yes, sir.

176 Q. Where was Kinzel? And what was he doing if you saw him at the time or just before the cars coupled to the dozer?

A. He was standing right about in here. He starts——

Q. Where was "in here"? On which side is that?

A. Right along between here and here (indicating on the model).

Q. On the left hand side facing east

A. Yes, on this side of the train. He sprung out and he kicked the knuckle, at the same time they struck and he went down.

Q. Had it been raining that morning?

A. Yes, sir, it had been raining.

Q. What was the condition of the floor of the dozer on the end where he was standing?

A. She was slippery and was muddy.

Q. About how fast was the train moving, Mr. McGraw, when it was about to couple onto the dozer?

A. I should judge the same way it was every day, about three or three miles and a half, three or four miles an hour; never exceeded over four miles an hour at any time or at all.

Cross-examination, MICHAEL MCGRAW.

By Mr. Gray:

Q. What work were you doing that day?

A. Bridgeman; I was in the bridge gang.

Mr. Korte: It is not cross-examination.

Mr. Gray: I want to find out how this coincidence happened, how he happened to be right there at that time.

Q. Bridge gang. What work were you doing?

Mr. Korte: I object to it as not proper cross-examination; his work had no connection with this suit.

Mr. Gray: I have a right to find out where he was working, to show the probability of his testimony.

Mr. Korte: It is not cross—not proper cross-examination.

Mr. Gray: If the man was working in the next state there would be a reason why he could not have been in the place where the accident happened, and that is the only way you can prevent such testimony as that of this witness. I have a right to find out what the probabilities are of whether or not he is telling the truth.

The Court: I overrule the objection.

Q. What bridge were you working on?

A. Bridge 140.

Q. How far from that was it where this dozer was standing?

A. I don't believe it was less than a quarter of a mile, possibly.

177 Q. Had you walked from bridge 140 to the dozer?

A. Yes, sir.

Q. Along the train?

A. Yes, sir.

Q. Now, the truth of the matter is that the train was here and you were walking along the train here (indicating with the model)?

A. I was, yes.

Q. Now the truth is that that bridge 140 was way back of 142, over here, was it not?

A. Yes, sir.

Q. Now you were working on bridge No. 140, if you were, how does it happen you were walking along that train?

A. I was going to this bridge; the dozer was here, and was going to couple here, and I was going to get on this dozer.

Q. What do you mean?

A. I was right along here (indicating on the model).

Q. Where did you—Where had you been just previously?

A. I left the bridge and walked ahead of the train and alongside and was here when they were going to make this coupling.

Q. What bridge?

A. Forty-two.

Q. You were walking past the train, were you?

A. Certainly I was.

Q. And it was going about four miles an hour?

A. Yes, sir.

Q. How far back of the train were you any time after you left the bridge, how many car lengths?

A. After she passed there, one or two car lengths.

Q. You walked along the side of the train and in—How far was it from that bridge up to where this accident occurred?

A. I was way ahead of this train.

Q. I thought you said you walked along it?

A. I walked from Bridge 42 along this train.

Q. How far back was Bridge 42?

A. About three quarters of a mile, or else it aint that far, don't think; never measured it.

Q. How far was it from where this accident occurred where the head of this train passed you?

A. It never passed me at all.

Q. Oh, it never passed you at all?

A. I was right here by this car, going right alongside of it.

Q. When the train came up to you?

A. No. The train was going along.

Q. When it came along there you were right there (indicating with the model)?

178 A. I was walking alongside of the train.

Q. You were walking alongside of the train when the train got there?

A. Yes, sir.

Q. How far were you from the train when the accident occurred, when the train came along?

A. I was right in between here and here.

Q. You were right there?

A. Yes, sir (indicating on the model).

Q. Why did you tell the jury a little while ago you were walking alongside this car?

A. I was walking along the track here and the train running along here. I was walking along here and the train was slowing up all the time and that gave me a chance to walk by here.

Q. How far down were you when the train first got up to you?

A. I don't know; I might have been in between, in there—about five car lengths back when they got up to me.

Q. So you were walking about here when the accident occurred?

A. Yes, sir, and—

Q. And the train was going about four miles an hour?

A. Yes, sir. My intention was to get on this car.

Q. You had been on Bridge 42?

A. Yes, sir.

Q. What were you doing down there?

A. Working on the bridge.

Mr. Korte: I object to it as not proper cross-examination.

Q. What were you doing to the bridge there?

A. I was on the gang down there—

Mr. Korte: Just a minute. It is not proper cross-examination.

The Court: I think that is true, but still it goes to the credibility of this witness and the credit to be given the statement of the witness. I shall overrule the objection.

Q. How far was it from here then, down to Bridge 140?

A. From here down there?

Q. Yes.

A. You mean between the two bridges?

Q. No, between the dozer where the accident occurred.

A. Well, here's the dozer, standing right here.

Q. How far from it was that?

A. There would be only about, I suppose, two cars or so would be out on the bridge, two or three cars.

Q. You were going to ride two or three car lengths after having walked three quarters of a mile, were you?

A. Certainly I was.

Q. You feel very unkindly towards Mr. Kinzel, don't you?

A. No, sir.

179 Q. He fired you down there from the work because you were drunk didn't he?

A. No, sir.

Q. Didn't he fire you because you were drinking and didn't come back to work, because you went to town and were drinking and didn't come back to work?

A. No, sir.

Q. That's not true?

A. No, sir.

Q. Did he fire you at all?

A. No, sir.

Q. Cause you to be discharged?

A. No, sir.

Q. You worked there for him at one time?

A. No, sir; didn't want to work for him.

Q. Didn't want to—

A. Didn't want to work for him.

Q. Why?

A. Got another job. Got a better job, a better one.

Q. Didn't you work under him at one time?

A. Yes, sir, I did.

Q. Didn't you a little while ago say you didn't?

A. I said I didn't want to work for him after I left him once—that's what I said.

Q. You did work under him?

A. Yes, sir.

Q. Didn't you get intoxicated and didn't he fire you?

A. I did, yes, sir.

Q. What?

A. Yes, sir.

Mr. Korte: He didn't understand the question.

A. He didn't fire me.

Q. Did you resign?

A. I left him and stayed over there round there, and went to work again.

Q. Before that you worked for him; before you went to work for the bridge gang?

A. For Mr. Kinsel, yes. That's the man (indicating the plaintiff).

Redirect examination, MICHAEL MCGRAW.

By Mr. Korte:

Q. Do you know the length of Bridge 140, approximately?

A. No; I never found out the length of it.

Q. What part of that bridge were you going to?

A. I was going to go the whole entire length of the bridge.

Witness excused.

180      ADELBERT A. SHIELDS was called and being duly sworn as a witness on the part of the defendant, testified as follows on Direct examination,

By Mr. Korte:

Q. Give your full name to the jury.

A. Adelbert A. Shields.

Q. How old a man are you?

A. Fifty-five years old.

Q. What's your business?

A. Bridge building.

Q. For what company?

A. Milwaukee.

Q. How long have you been working for the Milwaukee road?

A. A little over twenty-eight years.

Q. Were you on the work the day that Kinzel was hurt?

A. I was.

Q. Were you there at the time that the train coupled onto the dozer where he was working, in that vicinity of the dozer at that time?

A. I was alongside the train, yes, within four or five lengths of that.

Q. Where did you first see the train as it was approaching the dozer at the time it came up to you and passed you?

A. Just as it came up to me and passed me.

Q. How fast was the train going as it passed you—How far from the dozer were you at the time the end of the train, I mean the end that would couple onto the dozer, how far from the dozer were you at the time that first car and the rest of the cars passed you?

A. About five cars, I think.

Q. Five car lengths?

A. Yes, about that.

Q. As the train passed to couple onto the dozer, how fast was the train moving?

A. About three or four miles an hour.

Q. Have you anything that recalls to your mind how you know it was moving that slow?

A. Well, yes. I was walking alongside and when they passed me I wanted to get a little way along there and find a good place to go down the bank, there was a good many stones falling off along the side, we always have to watch out for them, and I put my hand up on the side of the car and probably went ten or twelve feet along by the car, then I slid off down the bank along there.

Q. Had it been raining that morning?

A. Yes, sir.



181 Q. Was it raining then when you were walking along the train?

A. It was drizzling a little, but it had been raining before that.

Q. Had it been raining before that?

A. Yes, sir, it had been raining before that quite a little bit.

Witness excused.

NED H. LOMBARD called as a witness and having been duly sworn, as a witness on the part of the defendant testified as follows:

Direct examination,

By Mr. Korte:

Q. Give your full name?

A. Ned H. Lombard.

Q. What's your business?

A. Conductor.

Q. Railroad conductor?

A. Yes, sir.

Q. For the defendant company?

A. Yes, sir.

Q. You were conductor of the work train that was moving at the time Mr. Kinzel was hurt?

A. Yes, sir.

Q. Where were you on the train when the train was moving towards the dozer that morning?

A. On the rear of the tender.

Q. Could you see the dozer as you were moving towards the dozer?

A. Yes, sir. I knew where it was.

Q. Did you know about where it was when you coupled on the dozer and some distance before that?

A. The conductor that left the dozer there told me where he left it.

Q. Were you on the train at the time it left Ewan?

A. Yes, sir.

Q. How fast did that train move as it left Ewan and moved to bridge 142?

A. I judge about eight miles an hour.

Q. When it came to cross Bridge 142 how fast was it moving over the bridge and from there down to where he coupled onto the dozer?

A. About four miles an hour across Bridge 142.

Q. From the time you slowed down to four miles an hour, did you slow down any more until you coupled onto the dozer?

A. Yes, sir.

182 Q. To about what speed did you slow down when you coupled onto the dozer?

A. To between two and a half and three miles per hour.

Cross-examination, NED H. LOMBARD.

By Mr. Gray:

- Q. You were in behind the back end of the tender?  
A. No, sir; on the back of the tender. That is——  
Q. That is towards—the engine, do you mean was pushing the train?  
A. Yes, sir.  
Q. Were you where you could see the dozer?  
A. Yes, sir, I was.  
Q. Could you see the men on the dozer?  
A. No, sir.  
Q. At any time?  
A. No, sir.  
Q. What interfered with your view?  
A. The train and loads.  
Q. Did you see this washout signal or emergency signal given?  
A. I did.  
Q. How soon did the train stop after that?  
A. The engine stopped immediately.  
Q. "Immediately"; by that how do you mean?  
A. Well, it didn't move.  
Q. Didn't move at all.  
A. No—I wouldn't say it didn't move, but not very—Oh, five or six feet—not three feet.  
Q. Five or six feet?  
A. Not three feet.  
Q. Not three feet?  
A. No.  
Q. Had the coupling been made at that time?  
A. I couldn't say.  
Q. You don't know whether it had or not?  
A. No, sir.  
Q. How do you fix it that it was going two and a half or three miles an hour at the time or just before it stopped?  
A. Well, the same as get at any distance.  
Q. If you don't know when the coupling was made how are you able to tell counsel at the time it was made, it was going two and a half or three miles an hour?  
A. I don't think the coupling has anything to do with the speed of a train.  
Q. That refers to the time, though, don't it?  
183 A. Refers to the time?  
Q. Yes. At the time the coupling was made how fast was it going?  
A. It covers the time we was moving up to the car.  
Q. After you crossed Bridge 142?

A. Yes, sir.

Q. And the time before that?

A. Crossing 142, four miles.

Q. When did you reduce to two and a half to three?

A. When we approached the dozer.

Q. How far from the dozer?

A. I couldn't say exactly, but should judge from the looks of the dozer, and the man, the brakeman on the front end car, that it was five or six cars; that would be my judgment.

Q. Did you see the brakeman give any other signal than the emergency signal?

A. I saw him give the four car signal. We were reducing speed at that time.

Q. You think you came onto Bridge 142 going eight miles an hour?

A. Well, I say a little better than that, ten or twelve miles an hour, perhaps, when we got to Bridge 142.

Q. Now it has increased from eight to twelve miles? I will ask you again and see if you get it to fifteen?

A. Twelve miles an hour.

Q. Now I will ask you again how fast the train was going when you came to that bridge?

A. I will say twelve miles an hour.

Witness excused.

B. J. CASEY was called and having been duly sworn as a witness on the part of the defendant, testified as follows:

Direct examination.

By Mr. Korte:

Q. Give your full name.

A. B. J. Casey.

Q. How old are you?

A. Thirty years old.

Q. You are a railroad man?

A. Yes, sir.

Q. Brakeman on the train at the time Mr. Kinzel was injured?

A. Yes, sir.

Q. Where were you standing on the train?

A. Standing on the pilot of the engine facing the train.

Q. Could you see where Mr. Moody was stationed on the train?

184 A. Yes, sir.

Q. Were you in plain sight of him?

A. Yes, sir.

Q. Do you recollect seeing what signals he gave on the train that day?

A. Yes, sir.

Q. When the train moved towards the dozer—Getting down to the time when you intended to couple onto the dozer, do you recollect the signal he gave?

A. Yes, sir.

Q. What was his signal there?

A. His first signal I saw was the four car signal. The next signal was the violent stop signal.

Q. How far away from the dozer was the train when he gave the four car signal, how far from the train—how far from the dozer, if you know, from your position which you were in, looking ahead, about how far, in your judgment?

A. I should judge about four or five cars.

Q. What was the speed of the train at the time just before Mr. Moody gave the four car signal, about how fast were you moving?

A. About four miles per hour.

Q. How fast were you moving after he gave the four mile signal?

A. Well we kept slowing down gradually.

Q. Do you recollect when you coupled onto the dozer?

A. Yes, sir.

Q. With reference to the time of coupling, the time the coupling was made, when was the washout or emergency signal given?

A. It was given just after the coupling was made.

Witness excused.

JAMES MARRE was called and being duly sworn as a witness on the part of the defendant, testified as follows:

Direct examination.

By Mr. Korte:

Q. Give your full name to the jury.

A. James Marree.

Q. How old a man are you?

A. Thirty-six.

Q. What has been your business and is now?

A. Locomotive engineer.

Q. For the Milwaukee Railroad Company?

A. Yes.

Q. How long have you been locomotive engineer?

185 A. Seven years.

Q. Before that what were you doing?

A. Firing.

Q. How long have you been in the railroad business, connected with the movement of engines?

A. Fifteen years.

Q. You were the engineer driving the engine which was pushing this work train towards the bull dozer to couple onto it at that time, were you not?

A. Yes, sir.

Q. Where did you start from?

A. From Ewan.

Q. How many cars were in the train?

A. About twenty-four; twenty-three or twenty-four.

Q. Were they loaded or empty?

A. Loaded.

Q. As you moved out of Ewan on the main line towards where the dozer was, how fast were you going at the time you came to Bridge 142?

A. About fifteen miles an hour.

Q. When you came to this bridge 142, did you or not slow down?

A. I slowed them down to four miles an hour.

Q. From there on, did you slow down any until before you coupled onto the dozer?

A. Yes. As soon as I received the four car signal I——

Q. Who did you get your signal from?

A. Oscar Moody.

Q. He was located where on the train?

A. Right here (indicating on the model).

Q. "Right here" don't mean anything in the record. Where was he with reference to the engine?

A. He was on the last car.

Q. Was there anything between you and him to obstruct your view?

A. No.

Q. Could you see him plainly?

A. Very plain, everything was clear and it was straight track.

Q. Could you see his signals clearly?

A. Yes, sir.

Q. When he gave you the four car signal what did you do?

A. I applied the driver brake; that slowed down the train.

Q. How much did that slow the train?

A. Just about down to two or three miles an hour.

Q. That would be up to the time you struck the dozer?

A. Yes, sir.

186 Q. What, if any, signal did you get from him after that?

A. Got the violent stop signal and I made a sudden application of the brakes.

Q. How fast was the engine moving at the time the emergency stop signal was given?

A. Just about as fast as a man can walk.

Q. Had you used any part of the air up to that time?

A. Well, no, just the time I slowed down at the bridge, then I used the driver brake and slowed them down a little bit more.

## Cross-examination, JAMES MARRE.

By Mr. Gray:

Q. Up to the time you got that four car signal you were going about four miles an hour?

A. Yes, sir.

Q. After that, you were going about as fast as a man could walk?

A. Going about two or three miles an hour, about what a man could walk, yes.

Q. Let's see, which side were you?

A. I was on this side (indicating on the model).

Q. On this side?

A. Yes.

Q. Looking down the track?

A. Yes.

Q. Whereabouts in the car was Moody?

A. It is pretty hard to say that distance, pretty close to the end of the car.

Q. Pretty close to the east end of the car?

A. No, he was round about in here.

Q. About ten feet from the front end?

A. That's pretty hard to say from that distance.

Q. Well, how close was he, was he pretty close to that end of the car?

A. Well, I don't know. I could see him plain enough, plain and clear.

A. That would be on the right hand side, he was on that side of the car, was he not?

A. I don't know. I know I could see him plain enough.

Q. Have you not been pointing right along where he was, and stood on that side of that car?

A. I don't know. He was somewhere around in here.

Q. Now, was he over towards the fireman's side, or was he towards your side?

A. That I don't know. I could see him plain. I had a good plain view of him all this time, twenty-four car lengths.

187 Q. Has there anything happened in the last minute or two that made you think he was not on your side that you pointed at then?

A. No, not a thing in the world.

Q. Anything that has happened to make you think he was on the other side?

A. Not a thing in the world. I only know I had a good, plain view of him.

Q. Who was in the cab?

A. Mr. Shaunnesey and——

Q. Did you have a nice conversation there?

A. No, sir, nothing at all, no conversation whatever.

Q. Have you told the jury all you know about it?

A. When I got the signal I made a sudden stop of the train.

Q. You have told all you know?

A. Yes, sir.

Q. And all you saw?

A. Yes, sir.

Q. Did you see Kinzel there on the dozer?

A. No, I couldn't see him from my side?

Q. You didn't see anybody up there but Moody?

A. Yes, sir, that's all.

Q. He was the only one you saw up there?

A. Yes, sir.

Witness excused.

J. F. BRINTON was called and being duly sworn as a witness on the part of the defendant, testified as follows:

Direct examination.

By Mr. Korte:

Q. Give your full name to the jury.

A. J. F. Brinton.

Q. How old are you?

A. Thirty.

Q. What's your business?

A. Locomotive fireman.

Q. You were fireman on the engine at the time Mr. Kinzel was hurt, were you?

A. Yes, sir.

Q. The engine you were firing was an oil burning engine, was it?

A. Yes, sir.

Q. At the time you moved out of Ewan towards Bridge 142 how fast were you moving?

A. Twelve or fifteen miles an hour.

Q. Did you slow down as you were crossing that bridge?

188 A. We did, to—

Q. To about what speed did you slow down?

A. To four miles an hour.

Q. From then on until you coupled onto the dozer, did you slow down any after that?

A. Just before we got to the dozer.

Q. Tell what made you slow down just before you got to the dozer, if any signals were given or anything.

Mr. Gray: I object to that as leading and suggestive.

Q. Did you, at that time, see Moody on the train or at all?

A. Yes, sir.

Q. Where was he standing?

A. He was on the end car next to the dozer.

Q. What if any, signals did he give before the train was coupled on to the dozer?

A. He gave the car signals. I saw him give three car signals.



Q. To what extent did the train slow down after he gave that signal?

A. Well, it slowed some.

Q. To what extent?

A. It slowed down from about four miles, I should say, down to about three.

Q. Do you recollect when it coupled onto the dozer?

A. I could see the dozer move, but couldn't tell.

Q. When you saw the dozer move, what was the rate of speed the train was making when it coupled onto the dozer?

A. Well, the engine was about stopped. I don't know how the movement up to this end was.

Q. After that was there any signals given by Mr. Moody, and if so, what did he give?

A. I saw him give the violent stop signals.

Witness excused.

ARCH E. CAMPBELL was called and being duly sworn as a witness on the part of the defendant testified as follows:

Direct examination.

By Mr. Korte:

Q. Give your full name to the jury.

A. Arch E. Campbell.

Q. How old a man are you?

A. Forty-one.

Q. Where do you reside?

A. In Malden, Washington.

Q. What is your business?

A. Trainmaster, Chicago, Milwaukee & St. Paul Railway.

189 Q. Were you trainmaster of the division which includes Lavista and Ewan?

A. I was superintendent at that time.

Q. As superintendent you had charge of the work that was being carried on at this place?

A. I did.

Q. What work was being done on Bridge 140 and 142 at the time Mr. Kinzel was injured—or just a minute—strike that out. What work was being done at that point when Mr. Kinzel was hurt?

A. We were constructing an embankment underneath those bridges which would eventually replace the bridges.

Q. When did you first commence to construct the embankment under bridge 140, say, the first one you started?

A. I don't recollect which was the first; think both began about the same time.

Q. Where did you get the material from originally for the fill as first constructed?

A. From the vicinity of Lone Pine, near Tekoa, Washington.

Q. You were constructing at that point?

Mr. Gray: I object to that, as immaterial.  
Overruled.

A. We were making a line change and grade reduction to make more economical operation at that point.

Q. Where was the line being changed with reference to the main line then in operation?

A. It was on one side of the original line.

Q. It was not the main line itself?

A. You could not reduce grades underneath a railroad you are operating.

Q. The earth you were taking from the cut the company was making was hauled from there to these two places known as Bridges 140 and 142?

A. It was.

Q. When you got through with the earth excavation there and the movement of it to these two places, what other material did you get to complete the fill, or the two fills that were being made?

A. We had an improvement to make at Ewan in the nature of a line change, to afford more ground for station facilities, side track, stock yards, and so forth, and we utilized the material obtained from that source for the continuation and completion of the fill.

Q. You were then excavating there at Ewan for those purposes?

A. Yes, sir.

190 Q. Do you recollect the time Mr. Kinzel was hurt, Mr. Campbell?

A. I do, yes sir.

Q. On the day that he was hurt, tell the jury whether or not the fill under either one of those bridges was complete, so that it could be used instead of the bridge.

A. It was not completed under either 140 or 142.

Q. What were the rails and ties resting upon over which your trains were moving on the day Kinzel was hurt?

A. Resting on the bridge itself, not on the embankment.

Q. When were those two fills completed?

A. They were completed so far as putting the track on them I should say about two months after that.

Q. About two months afterwards?

A. Yes.

Q. What was done with the top of the bridge itself?

A. We took the rails off and ties off of each bridge and then we graveled and relaid the track itself upon the fill itself, the bridge being filled was no further support for it after that time.

Q. As superintendent and road master, have you come in contact with work trains such as this Western Air Dump car which was being used at that time when Mr. Kinzel was hurt?

A. I think your question is as roadmaster and should be as trainmaster.

Q. I beg pardon. I do not want to get your official position wrong. Your position is what, now?

A. Trainmaster.

Q. What machine were you using when hauling the earth from Lone Pine?

A. We used what is known as a Haskell & Booker Lidgerwood car.

Q. And before that you simply with that piece of machinery you dumped your cars and had the material fall down between the cars?

A. Those cars are side dumps that swing out and we run a plow through the middle and plow out the material through these side dumps and it falls outside of the rails and ties.

Q. When did you commence to use the dozer or bull dozer on these bridges?

A. When the material got so high that it would remain on the track.

Q. What was the purpose of using the dozer there?

A. To level the fill, shove the material out and make the embankment; widen the fill.

Q. When you say level it you mean widen it?

A. Widen it, yes, sir, shove it out.

191 Q. At the time you commenced making that fill, tell the jury whether or not the fill was being made for the purpose of sustaining the bridge itself or in connection with the property?

Mr. Gray: I object to that as immaterial.

The Court: I overrule the objection. I do not see the materiality of it, but will allow it.

A. It was an improvement in our railroad. We always consider a gravel fill superior to a wooden structure. And this was a permanent improvement that we were making at that time.

Q. To take the place of the bridge, eventually?

A. Yes, sir.

Q. Do you know the physical condition of that bridge when you started to fill it?

A. All I know about it was so far as I know that it was in first class condition.

Q. I will ask you to examine this blue print—

Mr. Korte: I wish to place this in the record for the purpose of showing the Lone Pine work. Defendant offers in evidence a blue print, which I ask to be marked for identification Defendant's Exhibit No. 5, showing the line change at Lone Pine as testified by the witness Campbell.

I also offer in evidence a blue print which I desire to have marked for identification "Defendant's Exhibit No. 6" showing the territory excavated at Ewan for the purpose of depot and side track purposes.

Mr. Gray: I object to them as incompetent, irrelevant and immaterial.

Mr. Korte: I offer them just to identify the work going on at the time.

The Court: The objection is overruled; they will be admitted.

Said blue prints, defendant's Exhibits Nos. 5 and 6 were received in evidence.

Q. Do you know a man by the name of Bolzer or Bowlser?

A. I do not. I have heard of such a man.

Q. Is he working for the railroad company to your knowledge?

A. Not to my knowledge.

Cross-examination, ARCH E. CAMPBELL.

By Mr. Gray:

Q. I understand you are doing this to make some slight change in the location of your line?

A. We were making very extensive changes.

Q. Bringing it slightly to one side?

A. The quantities of earth there are all out of proportion, of course, to what would be indicated on the map. There is an  
192 immense yardage came out of there, probably three or four hundred thousand yards.

Q. The purpose was two-fold: The improvement of your track at Lone Pine, your track, grade, etc., and at the same time filling these wooden bridges further west?

A. Exactly, sir.

Q. During the time you were working on these bridges, filling them, the trains, the interstate trains passed to and fro over the track and over the bridges?

A. Yes sir, over the bridges.

Q. There at Ewan you were putting in some side tracks?

A. We were preparing to, making room for them, yes.

Q. And those side tracks were for use in your interstate business?

A. Yes, sir.

Q. While you were filling that from material from Ewan, the bridges were also being used by your interstate trains?

A. Yes, sir.

Q. You used this Lidgerwood engine until the material got right up close to the track?

A. No. We used the Lidgerwood engine, Mr. Gray, until we discontinued getting material from Lone Pine. We had two different sets of equipment, air dump cars used from Ewan, and the other from Lone Pine. At one time we were hauling with both.

Q. At the time of this accident this bridge 140 had been filled right up into the ties?

A. They don't use the dozer until it gets up high enough so they have to push it out, or widen it out, to continue construction; in—

Q. In other words, you don't use the dozer until it gets up level with the ties?

A. Exactly so.

Q. Mr. Kinzell's duties on that kind of work were also to take the shovel and get the rocks off the ties and off the track?

A. Yes, sir.

Q. And after the dozer was taken away when any trains were going by it was necessary that these rocks should be taken off the tracks?

A. Yes.

Q. That was part of his duties?

A. Yes.

Q. So that trains could pass there with safety?

A. Yes. That was the reason it was done, to make it safe for the operation of trains, so we would not be delaying any through accidents occurring.

193 Q. The dozer would not do that?

A. No, the dozer put the dirt on the track for the purpose of making the fill, that is it spread it out, but it does not clean it up between the rails at all. It works clear outside of the rails, and the men clean the inside with their shovels.

Redirect examination, ARCH E. CAMPBELL.

By Mr. Korte:

Q. It is also necessary to keep the work trains out of the way so you would not interfere with other trains running over that ground?

A. Yes, sir.

Q. To keep the dozer out of the way?

A. It was.

Q. So that it would not interfere with trains moving at that point?

A. Yes.

Witness excused.

J. F. PINSON was called and being duly sworn as a witness on the part of defendant testified as follows:

Direct examination.

By Mr. Korte:

Q. Give your name to the jury.

A. J. F. Pinson.

A. Civil engineer for the Milwaukee & St. Paul.

Q. What position do you hold?

A. Assistant engineer in charge of bridges and building.

Q. You are acquainted with bridges 140 and 142?

A. Yes, sir.

Q. And were at the time Mr. Kinzel was hurt?

A. Yes, sir.

Q. At the time the fill was being made under each one of them?

A. Yes.

Q. Have you, at any time, made an inspection of either one of those bridges, to know its life and capacity?

A. Yes, sir.

Q. From the inspection that you made, Mr. Pinson, and your knowledge of these two bridges, what was the life of both of these bridges at the time these two fills were being constructed?

Mr. Gray: I object to that as incompetent, irrelevant and immaterial.

The Court: Well, I overrule the objection.

A. Why, at least two years.

Q. What do you mean by that?

A. Two years from the date of inspection.

194 Q. When were those two bridges built?

A. In 1908.

Q. What was the condition of the timbers up to the time these two fills were being made, with reference to their stability as a bridge?

A. The timber was in good condition.

Q. Were these fills being made, if you know, for the purpose of sustaining the bridges themselves?

A. No, sir, it was not.

Q. What was the purpose of the two fills?

A. The fills were to eventually replace the bridges.

Q. Examine the blue print defendant's Exhibit No. 5, and, for the purpose of making the record, what does that show with reference to the line change at that point, Lone Pine?

Mr. Gray: The blue print itself is the best evidence.

Q. What I want to get at is what you find that yellow line and red line shows.

The Court: He can state what the red line and yellow line show.

A. The yellow line shows the line that was being operated, and the red line the new line that was being built at that time.

Q. Now examine Exhibit No. 6, and state what is indicated thereon, if you know, as being the work of excavation at Ewan for the purpose as stated by the witness Campbell.

A. The red lines on this print show the main operated line and the spur track at the time this work was going on.

Q. What line shows the excavation which was made at that time?

A. The heavy dotted black lines.

Cross-examination, J. F. PINSON.

By Mr. Gray:

Q. You call this "Borrow Pit" there; what do you mean by that?

A. That is where material is excavated.

Q. For the track?

A. For any purpose.

Q. Well, it would be put along the track and under the bridge?

A. Yes.

Q. When did you make that inspection?

A. In April, 1914.

Q. You said the bridge then had two years of life?

A. At least two years.

Q. You mean by that, after that time, you would have to fill in there, or build a new bridge; is that the idea?

A. Probably at that time.

Witness excused.

195 Miss EDNA EVANS was called and being duly sworn as a witness on the part of the defendant testified as follows:

Direct examination.

By Mr. Korte:

Q. Give your name to the jury.

A. Edna Evans.

Q. Where do you reside?

A. Ewan.

Q. How long have you resided there?

A. Four years.

Q. At that place. What do you do there?

A. Assistant postmaster.

Q. Your father is postmaster at that point?

A. Yes, sir.

Q. Were you postmistress during 1915?

A. Yes, sir.

Q. And down to date?

A. Yes, sir.

Q. Do you know Mr. Kinzel?

A. Yes, sir.

Q. The plaintiff in this case?

A. I do.

Q. How long have you known him, Miss Evans?

A. Ever since he came there to work.

Q. Do you remember the time when he was injured?

A. Yes, sir, I do.

Q. On our road?

A. Yes, sir.

Q. By the way, your father is not connected with the railroad?

A. No, sir.

Q. Has no connection with the railroad?

A. No, sir.

Q. Neither have you?

A. No, sir.

Q. Do you remember when he came from the hospital—Do you know where he was living at the time he was hurt, he and his family?

A. Yes, sir.

Q. Where?

A. At LaVista.

Q. Do you recollect when he came from the hospital after his injury was received?

A. Yes, sir.



Q. During the time that you saw him after he came from the hospital, how often would it be that you would see him?

A. Oh, most every day.

196 Q. What occasion would you have for seeing him?

A. He would come to the office to get his mail.

Q. And how often, when he came there for his mail, would he come there to get his mail?

A. Most every day.

Q. Would you observe how he walked during that period of time when he came from the hospital, with reference to whether he would use a cane? Did you or not?

A. He didn't use any cane.

Q. Did he limp at all?

A. No, he did not.

Q. Did you notice when he came for his mail how he would use his right arm?

A. He would — it naturally.

Q. He would?

A. Yes, sir.

Q. What was there in the post office with reference to the windows there at which he would transact business, that he had to do with you? Do you recollect any instance there in which he would make use of his right arm by lifting it up and out from his body?

A. He would raise both hands to take his mail from the window.

Q. What else did you see him do with reference to writing?

A. I saw him write.

Q. Where was it you saw him write? Where did he do any writing?

A. I saw him write on the money order window and I saw him write on the sewing machine.

Q. You lived in the same building, and your family did, in which you had the post office?

A. Yes, sir.

Q. When you saw him write at the money order window, how high would his arm come up with reference to the top of his shoulder?

A. Up even with his shoulder.

Q. Indicate to the jury.

A. (Witness does so, holding her arm.)

Q. Do you recollect any particular instance where he made use of his arm that brought it round, brought it up round above his shoulder?

A. Once.

Q. What was that instance?

A. He yawned and stretched.

Q. Show how he yawned and stretched. Brought his arms up above his head.

197 A. (Witness indicates.)

Q. Have you ever seen him, during the time he lived at LaVista when he came for his mail, use a cane?

A. No, I did not.

## Cross-examination, EDNA EVANS.

By Mr. Gray:

Q. Are the regular patrons of the post office over there pretty tall people?

Mr. Korte: I object to that as not proper cross-examination.

Q. I was wondering, madam, why, about this money order window where you had to get your arm up even with your shoulder, how does it happen that it was so high?

A. Well, anybody writing is required to put their arm like that (indicating).

Q. How do little short people manage to get up to that to write; how do they do it?

Mr. Korte: I object to that as not proper cross-examination.

Sustained.

Q. You were watching Mr. Kinzel all these times?

A. Yes, sir, I was.

Q. Under pay from the railroad company?

A. No, sir.

Q. How did you come to be watching?

A. I just observed.

Q. I know, but what was the consideration that made you a watcher?

A. Well, he was transacting some business at the window and I was seeing him, I was waiting on him, consequently I looked at him.

Q. Was that the only time that you paid any particular attention to him?

A. No. I paid attention to him when he came, because we were quite interested at his being hurt and I was surprised to see him get around as well as he did.

Q. You didn't have any other interest than that in watching him?

A. I did not.

Q. State when it was he yawned.

A. I can't tell the date.

Q. Didn't you mark that down?

A. No.

Q. Didn't tell Mr. Korte the date?

A. I didn't know it.

Q. What year was it?

A. 1915.

198 Q. What time of the year?

A. It was after he came back from the hospital, shortly.

Q. About what month?

A. About in the early part of March.

Q. You know Mr. —, this fine looking gentleman back here?

A. I do.

Q. He is one of the witnesses for the Milwaukee, claim agent, is he not, if you know?

Mr. Korte: I object to that as not proper cross-examination.

Q. Do you know what his business is in connection with the Milwaukee Company?

A. I do not know.

Q. Never heard?

A. No, sir.

Q. Did he ever tell you?

A. No, he didn't.

Q. You and he are great friends, are you not?

A. Why, I have nothing against Mr. —.

Q. I didn't ask you that.

A. Why yes, I am a great friend of his.

Q. It was at his request that you were watching, was it not?

A. It was not.

Q. When was it he came up to you and reached up both hands for his mail?

A. I don't know just when it was he came into the office and did that.

Q. When he came for the mail, he reached both hands for the mail?

A. Yes, sir, he did.

Q. He attracted your attention in that manner, that attracted your attention as being unusual that anyone should come with both hands extended for their mail, didn't it?

A. No, sir, it was natural.

Q. Is it usual for patrons of that office to take their mail with both hands?

A. Some of them do; according to how much mail they get.

Q. Did he get a great deal of mail?—Now, on the question of yawning. Do you remember of seeing him yawn before the accident?

A. Sometimes he did, when he was standing around there outside the window.

Q. I am asking you now if you remember of seeing him yawn before the accident.

A. No, I do not.

Q. But you do remember after the accident?

199 A. I do.

Q. That was in the early part of March?

A. Yes.

Mr. Korte: You are positive it was after he came out of the hospital?

A. It was after.

Mr. Gray: I object to the form of the question.

Witness excused.

Mrs. BRIDGET DELANEY was called and being duly sworn as a witness on the part of the defendant, testified as follows:

Direct examination.

By Mr. Korte:

- Q. Give your name.  
A. Bridget Delaney.  
Q. How old a woman are you?  
A. Forty-eight.  
Q. And live where?  
A. La Vista.  
Q. Your husband is section foreman at that point on the railroad?  
A. Yes, sir.  
Q. At that point are there any houses, at La Vista, or is it just a passing station?  
A. Just a passing station.  
Q. With a section house?  
A. Yes, sir.  
Q. Do you recollect when Mr. and Mrs. Kinzel lived there?  
A. Yes, sir.  
Q. Do you remember when he was injured?  
A. Yes, sir.  
Q. Do you remember when he came back from the hospital?  
A. Yes, sir.  
Q. He stayed around there a considerable length of time, did he?  
A. About a month.  
Q. Then, did they move away from there then?  
A. Yes, sir.  
Q. During the time he lived there that month did you observe his movements with reference to the use of his legs or arms?  
A. Yes, sir.  
Q. Tell the jury whether or not during that month he used a cane to walk with.  
A. No, sir.  
Q. Did he later at all?  
A. No, sir.  
200 Q. Did he make use of his right arm at any time you can recollect?  
A. Yes, sir.  
Q. Tell the jury what you do recollect.  
A. I saw him coming with two buckets of water from the spring.  
Q. Where was the spring located with reference to the car in which they were living?  
A. I should judge about four hundred feet from the car.  
Q. How was the ground there, hilly or level?  
A. On an incline.  
Q. What else did you see him do?  
A. I saw him hold a blanket for Mrs. Kinzel to throw on the line.

Q. What were they doing at that time?

A. They were getting ready to move away.

Q. How did he hold that?

A. He held these garments up and she pinned these garments to the blanket.

Q. How high up would he hold the blanket with reference to his head.

A. I should judge between five and six feet.

Q. Did his arms go up to his head or not?

A. He put them up about five or six foot, up (indicating).

Q. Do you know of any other things you saw him do round there?

A. I saw him—well, of course I saw him bringing water.

Q. Do you recollect whether he limped?

A. I never saw him.

Q. When was it you saw him the first time again?

A. When I came here to Wallace.

Cross-examination, BRIDGET DELANEY.

By Mr. Gray:

Q. You never saw him between that time and when you came to Wallace?

A. Never saw him.

Q. You don't know whether he has not been walking with a cane for a long time?

A. I never saw Mr. Kinzel with a cane until I saw him here.

Q. You don't know—you don't want to leave the impression with the jury that he has not been using one for a long time?

A. I don't understand what you mean.

Q. Well, probably the jury does. Your husband is still working for the company?

A. Yes, sir.

201 Q. Were you a kind of a spotter down there?

A. No, sir, I have no occasion to.

Q. Did you talk with reference to this to anyone?

A. Mr. — came there and asked me if I had seen Mr. Kinzel round there, after he came from the hospital and I said I had.

Q. When was that?

A. In May, 1915, I guess.

Q. That Mr. — came to you?

A. Yes, sir.

Q. Did you keep pretty close watch?

A. No, sir, I didn't. He was living right there. I had nothing else to see.

Q. You kept pretty close watch?

A. No, sir, I didn't. I was out in the yard tending to the chickens, and couldn't help but see what went on around there.

Witness excused.

Thereupon the jury was admonished by the Court as required by law and excused until 9:30 o'clock tomorrow morning, to which hour court adjourned.

Thursday, November 2nd, A. D. 1916—  
9:30 o'clock A. M.

At this time, present as before, the proceedings—the record of yesterday's proceedings was read and approved, and the jury being all present, the trial of this cause proceeded as follows:

Dr B. E. CORNWALL was called and being duly sworn as a witness on the part of the defendant, testified as follows:

Direct examination.

By Mr. Korte:

Q. Give your full name to the jury.

A. B. E. Cornwall.

Q. You are a licensed physician and surgeon in the state of Idaho?

A. Yes, sir.

Q. Where are you practicing?

A. St. Maries, Idaho.

Q. You have charge of a hospital there?

A. I have.

Q. Of the Milwaukee Hospital Association?

A. I have.

Q. Of that association, Mr. Kinzel was a member, was he?

A. Yes.

Q. How long have you been a practicing physician and surgeon?

A. Nine years.

202 Q. Of what school are you a graduate?

A. Rush Medical College.

Q. What experience have you had by way of surgery?

A. I served an internship of eighteen months in Cook County Hospital in Chicago and my practice has been quite largely along surgical lines since that time.

Q. Have you had extended or any experience in regard to injuries to people, due to violence?

A. Yes, I have seen a number of cases, taken care of quite a number.

Q. Does your surgery extend along that line, concerning railroad and other employees?

A. Very largely, yes.

Q. You were the surgeon in charge of the hospital when Mr. Kinzel came there for treatment?

A. Yes, sir.

Q. When he came to the hospital, doctor, tell the jury whether you made physical examination of him to determine the extent of his injuries?

A. Yes, I did.

Q. Tell the jury what you found on his body by way of injuries.

A. He had a fracture of the right shoulder blade and he had some bruises on the left side of his back over the hip, and he had a tear of the skin down near the rectal opening.

Q. Describe the manner that you found, or the condition that you found in that region and the region of the rectum.

A. He had a tear of the skin in the perineal region down near the rectal opening.

Q. What you mean by the perineal region, is in the region of the rectum?

A. Yes.

Q. Describe that wound to the jury.

A. Well, this wound was on the left side of the rectal opening and consisted of a stripping back of the skin of a flap which was two and a half inches long and two inches wide, approximately, starting at the rectal opening and extending to the left, somewhat backward for a distance of two and a half inches.

Q. How large was it at the rectal opening?

A. I judge about an inch and a half.

Q. Could you prepare a diagram of it and show for the benefit of the jury, the rectal opening and the condition of this wound, and its direction therefrom?

A. (Witness takes a pencil and paper and makes diagram.)

Q. Explain that, doctor.

A. This round part is supposed to be the rectal opening.  
203 You are looking at this from below. This is the left side of the buttocks and this is the right side.

Q. "R" will represent right side and "L" the left side of the buttocks?

A. Yes, sir.

Q. And the parallel lines represent what?

A. They represent the size of the skin tear.

Q. Which way was that, that flap of the skin?

A. That was away from the rectal opening.

(Said diagram was marked for identification "Defendant's Exhibit No. 7.")

Mr. Korte: To illustrate the testimony of this witness defendant offers in evidence this exhibit, marked for identification Defendant's Exhibit No. 7, being the diagram drawn by the witness.

The Court: It will be admitted for that purpose.

Q. To what extent had the wound extended in depth through the skin or fleshy part?

A. Just to the skin, and through the superficial fascia.



Q. And to what extent were the sphingster muscles torn or injured?

A. They were not injured.

Q. Were they torn at all?

A. No.

Q. Now, I presume you better describe to the jury what is meant by the sphingster muscles.

A. There are both external and internal sphingster muscles, there is both an external and internal sphingster muscle. The external sphingster is a muscle somewhat oblique in shape, which surrounds the lower end of the rectal opening and acts as a shut-off. The internal sphingster is a little above that of larger size and more round in character, and serves practically the same purpose.

Q. What does the inner sphingster control and what does the outer sphingster control?

A. Both have the same or practically the same purpose. The inner sphingster is the stronger of the two, the larger muscle.

Q. When you came to this wound with reference to the rectal opening, what did you do by way of repairing it?

A. I sewed it up; sewed the flap back in position, sutured it.

Q. How did you maintain it in that position?

A. I took the stitches out on the sixth day afterwards.

Q. Why did you take them out?

A. The flap was not uniting by primary union; the stitches were cutting some and were not serving any purpose at that time, so I took them out.

204 Q. What, if any, interference was there to the action or control of the bowels due to this injury near the rectal opening which you just described?

A. There was not any.

Q. He was able to control his bowels, was he?

A. Yes.

Q. What did you do during that time, if anything, by way of regulating his bowels so when the wound would heal to determine whether he could control them?

A. During the first four days I gave him medicine to keep the bowels from moving, so there would be no excretion pouring over this wound.

Q. What, if any, incontinence of the bowels, that is, inability to control the bowels?

A. He had no incontinence or inability to control the bowels during that time.

Q. You mean by "no incontinence"?

A. I mean he was able to control his bowels between the times of their acting.

Q. How long was he in the hospital?

A. Eleven days.

Q. He then left and went to Doctor Platt's hospital, did he?

A. Yes.

Q. Now, at the time when he was there under your care, did you find any evidence of injury to the left hip or hip joint?

A. No, I did not.

Q. Any external evidence of it?

A. Not over the hip joint, no.

Q. Where did you see any evidence of anything on his body?

A. He had bruises on the left side of the back above the hip bone, just about the upper—along the crest of the hip bone, pretty well back.

Q. What complaint did he make as to any injury to the hip while there?

A. He didn't make any complaint of injuries to the hip.

Q. Was there anything that took place there that would justify your statement that there was no injury to the left hip, as you stated while you were in charge of him; any act he would do that can throw any light on the matter?

A. He was able to stand on his left foot.

Q. How is that?

A. He would stand on his left foot; could get him up, stand him on his left foot when dressing the back.

Q. Did he make any complaint when you were doing those things?

A. I don't recollect any complaint of his left hip.

205 Q. Now with reference to the injury to the shoulder, fracture of the shoulder blade, doctor, did you find any paralysis of any of the nerves in that region at that time?

A. No.

Q. Any paralysis of the circumflex nerve, that is, the nerve which controls the motion of the arm described to the jury?

A. Why, no; I didn't find any paralysis at that time. There was limitation of motion, of course in that shoulder, caused by the fracture.

Q. Fracture of the shoulder blade?

A. But I don't know anything about paralysis.

Q. Well, he left the hospital. What was the condition of his arm and shoulder blade when you last saw it?

A. It was in good condition. Of course it was still painful, tender, but he was feeling nicely I thought.

Q. What was the condition of the wound near the rectum which you described, as to whether or not it was granulated?

A. It was granulating.

Q. What do you mean by that?

A. I mean the healthy tissue was forming about the base and the flap had healed to some extent when he left the hospital.

Cross-examination, Dr. B. E. CORNWALL.

By Mr. Gray:

Q. What hospital is yours?

A. St. Maries Hospital.

Q. Who is that operated by?

A. By the Milwaukee Hospital Association.

Q. You are working there on salary?

A. Yes, sir.

Q. Dr. Bouffleur is the chief surgeon of that association?

A. Yes.

Q. It is the hospital to which all the employees are taken who are injured there?

A. Yes, sir.

Q. You get many employees of the lumber companies there?

A. Yes.

Q. It is the particular business of that hospital to care for those employees who pay a certain sum per month?

A. Yes, that is true.

Q. Have you described all of the injuries you found on your examination?

A. Yes.

Q. If he had any others you did not discover them?

A. No, sir.

Q. Was he running any fever in the hospital?

A. Yes, he was.

206 Redirect examination, Dr. CORNWALL.

By Mr. Korte:

Q. Did I understand you to say the Milwaukee Hospital Association treated employees of the lumber companies, as members of that association?

A. Oh, I didn't understand the question that way.

Q. I wish you would straighten that out. State what the Milwaukee Hospital Association is.

A. My understanding of the Milwaukee Hospital Association is that it is for the benefit, it is a mutual benefit association for the care of the employees of the Milwaukee Railway Company.

Q. The employees are members thereof?

A. Yes, sir.

Q. Of which Mr. Kinzel was one?

A. Yes, sir.

Q. Entitled to care and treatment?

A. Yes, sir.

Q. How are the members admitted to that association and how is the association maintained?

A. Well, maintained from deductions made from these employees who become members.

Q. The members contribute a certain amount to the fund?

A. They contribute a certain amount.

Q. To maintain the association?

A. Yes.

Recross-examination, Dr. CORNWALL.

By Mr. Gray:

Q. If the hospital makes a profit does that go to the employees? Who gets the profits, if any?

A. From the operation?

Q. From the operation of the hospital. In other words, if you get more of these deductions, more of these voluntary contributions than it costs to run the hospital, who gets that?

A. I don't know about that.

Witness excused.

Dr. LEONARD E. HANSON was called and being duly sworn as a witness on the part of the defendant testified as follows:

Direct examination.

By Mr. Korte:

Q. Give your full name to the jury, doctor.

A. Leonard E. Hanson.

Q. What is your profession?

A. Physician and surgeon.

Q. Where are you located?

A. Wallace.

207 Q. How long have you been practicing medicine and surgery?

A. Since 1908.

Q. How long here in this community?

A. Since 1908.

Q. From what school are you a graduate, doctor?

A. University of Pennsylvania.

Q. What experience have you had in dealing with surgeries resulting from injuries that are due to violence?

A. Well, I have had quite an extensive experience along that line in Wallace and the Cœur d'Alene country, handling the men at the mines and lumbering camps around here.

Q. You examined Mr. Kinzel did you not, for the purpose of determining the kind and extent of his injuries, if at all?

A. I did.

Q. When did you make that examination, and in whose presence, and how did you come to make it?

A. I made the examination of Mr. Kinzel on the fifth of June this year in the presence of Dr. Mason of Kellogg, and Dr. Bouffler and myself.

Q. Where was that examination made, with reference to locality here in the city?

A. In my office in Wallace, yes.

Q. Now tell the jury just how complete an examination you made of him, starting from the time he came to your office and coming down through the entire time, using simple words.

A. My examination started when he walked into the office. I kept him waiting about fifty minutes in the reception room before I could receive him. I received him in the office about nine o'clock and got through with the examination about ten thirty.

He walked into the office limping on the right leg, favoring the left—or walking on the left leg. He was stripped and examined

thoroughly from head to foot. The result of that examination revealed some wasting of one of the muscles above the shoulder blade. Subsequently an X-ray examination revealed a fracture of the shoulder blade—

Q. Which shoulder?

A. Of the right shoulder. And a small, irregular scar near the anus, or the opening of the lower end of the rectum; and that was the extent of his disability at that time. Everything else was normal, the way it should be.

Q. You are describing now the shoulder, are you?

Mr. Gray: No. He is describing the whole man.

A. I am describing the disability which I found. At the time of the shoulder examination tests were made for temperature, sense of touch, pain, heat and cold, strength and measurements  
208 of the right shoulder as compared with the measurements of the left shoulder.

Q. Can you give those measurements?

A. Yes, I have them.

Q. I wish you would give them to the jury.

A. (Examining his notes) Circumference of the right shoulder was eighteen and one half inches; circumference of the left shoulder was eighteen and one half inches; length of right collar bone was seven inches; length of left collar bone was seven inches; circumference of the upper arm, that is this part of it (indicating), of the right arm was eleven and three-eighths inches; circumference of the left arm was eleven and four-fifths inches; showing the injured arm to be a trifle smaller than the other one; circumference of the fore arm on the right side, that is the arm just below the elbow, was ten and three-eighths inches on the right side, and ten and seven-eighths inches on the left side.

Q. What, if any, atrophy of the muscles of the shoulder did you find, or the arm?

A. I found some atrophy of the muscle which runs above and along the bone of the shoulder blade.

Q. To what extent?

A. Well, it was noticeable.

Q. Was it abnormal in amount?

A. No. There was no wasting of any of the muscles of either the arm or the shoulder which would not occur in any fracture of either arm or shoulder where it had been put in a cast or splint and when it had not been used. There was not enough wasting to account for the arm not being used for that length of time.

Another part of my examination that I marked was the electrical reaction.

Q. What did you find as to the temperature of the skin?

A. It was normal.

Q. And color?

A. The color was normal, what it should be.

Q. State what you did to discover whether or not there was any paralysis of the nerves which affect the arm.

A. There was no paralysis of the arm at all. This was determined in a number of ways. In the first place, if he had paralysis of the arm it would be very easy to raise that arm up. If he did not have a paralysis of the arm the muscle could be controlled. At the time I made the examination I finally got his arm up even with the shoulder. He complained of pain during that time, but would forget it occasionally. There was no widening of the pupils of the  
209 eye. Usually when you get a painful condition of that kind the pupils will dilate, even where they don't say anything about it. I tested for pain or for paralysis with a pin. His paralysis was never in the same place twice.

Q. Describe it if you can.

A. What is that?

Q. What do you mean by that?

A. Well, prick him with a pin at one place one time and he would say he couldn't feel it; go to some place else and come back to this same place in a little while and he would feel it. The most pronounced reaction shown by these muscles was with the electric current.

Q. Describe what that operation is and what it will do in determining whether or not there is paralysis.

A. A paralyzed muscle will not react to the electric current, the galvanic current, and will not react to anything else.

Q. What do you mean by "react"?

A. I mean it is dead to all intents and purposes.

Q. Whether or not he would feel it?

A. It is a question of the muscle contracting or muscle shortening. For instance, when you bring the fore arm up, the biceps muscles of the upper arm are contracted or shortened; that is the way you get at it to prove the upper part of the body. If any muscle is paralyzed you could not get a contraction of that muscle with the galvanic current.

I used it first a current of ten volts and about six mille amperes, and got a very slight reaction; in other words, slight reaction which is very usual because a great many people will not react to low voltage and low ampage. Then we used twenty volts and 20 mille amperes of current and got reaction around the shoulder including the one which was uninjured and the one which was injured. The reaction in the one which was injured was not what it should be, but it was there, showing there was not total paralysis of that muscle.

Q. How many mille amperes and volts did you finally use?

A. I used twenty of each.

Q. What was the effect?

A. The effect was reaction of the muscles.

Q. Could you show what would take place by motion, or indicate what it would do?

A. Well, when the electric current was applied to the muscle—There are two electrodes; one is applied to one part of the body and the other one is placed upon the area which you are testing; for instance, in this particular case the electrode was placed a little to the left of the right shoulder blade, then the other one was placed round

different parts of the shoulder; in other words, one electrode would be placed on one end of the muscle and the other one at the  
210 other end of the muscle. If the muscle is dead, or had no nerve supply, that muscle would not contract. But every muscle round the shoulder contracted when the electric current was applied to the shoulder.

Q. With reference to the circumflex nerve, where was that?

A. With reference to the shoulder and upper arm.

Q. What was the result when you tested the deltoid?

A. I got perfectly normal reaction.

Q. Did it raise the arm?

A. It did raise it to a considerable extent, six or eight inches during the time the current was applied.

Q. If Mr. Kinzel had paralysis of the circumflex nerve would there or not be a reaction such as you describe?

A. That reaction would be impossible if the circumflex nerve was destroyed.

Q. Would it make any difference what number of volts you used, would you get reaction anyway?

A. No. You could get no reaction with any number of volts if there was paralysis of that nerve.

Q. Suppose the test with the galvanic battery was made with but four mille amperes and the volts uncertain, what would you say of that kind of a test?

A. Well, it would depend a good deal upon the voltage that you use, the amount of voltage that you use; if you had twenty or thirty volts and use four mille amperes galvanic current, in perfectly normal persons you would get no reaction whatever.

Q. Did you make any other tests with reference to the arm by movements, pulling, etc.?

A. Yes. Practically every movement we tried to make of the shoulder was resisted but we got motion and in all directions. We got enough motion in all directions to show perfect freedom of the shoulder joint.

Q. What do you mean by "resisted"?

A. Would not allow us to move it.

Q. That is, you are speaking of that Mr. Kinzel was resisting the movement?

A. Yes.

Q. To what extent did you make this movement by pulling the arm or pressing the hand, or whatever you did, to what extent did you make it, etc., if you can describe it that way? To what extent did you make it, describe it in pounds and so forth, if you can describe it that way.

A. I should judge that of his own free will during this examination, he pulled twenty-five or thirty pounds and pushed an equal amount.

Q. With the right arm?



211 A. With the right arm.

Q. In doing that what did you do? Use a weight, or your own force?

A. I used my own hand.

Q. Your own hand?

A. Yes, sir.

Q. Can you describe the location of the sub-scapularis muscle in relation to the shoulder blade?

A. The sub-scapularis muscle is the muscle which lies on the front part of the shoulder blade. It acts as a pad over the lower part of the shoulder blade on the front side.

Q. Where is that located with reference to the bone, with reference to being between or on the outside of the circumflex nerve I am speaking of, of course.

A. The circumflex nerve comes out of the posterior part, that is the back part of the plexus or this bunch of nerves which occur in the arm pit. It passes through about the middle part of the shoulder blade then passes through the sub scapularis muscle to the head of the arm bone and then divides; in other words, the sub scapularis muscle is between the nerve and the bone.

Q. In the patient, Mr. Kinzel, where was it—

A. The muscle is interposed between the nerve and the fracture.

Q. Now, doctor, if the circumflex nerve was destroyed what would you be apt to find the condition of the muscle was, from the time he got this injury down to the time you examined him?

A. I would expect to find the arm to be not more than two-thirds of the size that I did find it; in other words, if the arm had been out of commission, the nerve supplying these muscles had been out of commission for a period of seven months, there would practically be no muscle there, it would be flat, flabby and very much smaller.

Q. Describe what you found by way of sensation over the deltoid doctor.

A. Well, you mean sensation to heat and cold?

Q. Yes. What tests you made in relation to determining sensation at that point.

A. We placed warm and cold objects on the skin. We placed hard and soft objects on the skin. In other words, I placed the handle of an instrument for the hard object and my fingers for the soft one, and he was able to tell what it was. The sensation of pain, as I stated before, was variable. Sometimes he would have pain in one place and sometimes he would not feel anything in that place. There was one particular spot where he claimed all his disturbance was; it was about down in here (indicating).

Q. Where is that?

212 A. About the lower part of the outside of the deltoid muscle.

Q. In which arm?

A. In the right arm.

Q. You pointed to the left. I asked you so there will be no confusion about it. What part of the skin over the deltoid muscle is supplied by the circumflex nerve?

A. The circumflex supplies the inner——

Q. Point to your right arm, then we will not get them confused.

A. It supplies the lower one third of the deltoid on both the inside, outside and back part of the skin over the arm. It does not supply the upper two thirds of the deltoid muscle, that is, the skin of the upper two thirds of the deltoid muscle.

Q. In what condition did you find that in?

A. The skin was normal; in the way it should be.

Q. What evidence would that be of the skin if it was affected by the paralysis of that nerve, what would you find the skin to be?

A. In paralysis the skin is very glossy; has a dead appearance. You can tell it as far as you can see it. The hair has a dead appearance and breaks off easily. The temperature is usually cold, clammy, moist sometimes and if it is paralyzed there is no sensation in the skin, they feel nothing.

Q. Now, doctor, from your examination that you made of the man's arm what, in your opinion is its condition with reference to his ability to use it?

A. I don't believe at the present time he could use it very much. With use, getting busy on it, having it treated and working it, I think he would recover practically the whole use of his arm.

Q. Explain to the jury why the present condition is as you say, that he could not use it now? What is that due to?

A. It is due to disuse, holding it in one position and not using it. If any arm or limb or anything else were put up in a sling and left without using it, it will shrink, get smaller.

Q. How does that affect the arm with reference to normal use?

A. The longer it is up the less ability there is to use it. You can't use it and it is necessary to train it all over again.

Q. Now going to the other part of his anatomy: What other test did you make of the man to determine any injury and what did you find?

A. From the shoulder I examined the anus and buttocks. What I mean by the anus is where the stool matter comes out at the lower end of the rectum.

He had an irregular shaped scar running from one cheek of the buttocks over to the anus. This scar at the time I made the  
213 examination was healed. There was practically no depression. It showed the scar. The scar was firm, well healed and in very good condition at the time I examined it.

A. Deep or superficial?

A. It was a superficial scar. I made an examination of the anal muscle or sphincter muscles. In making this examination I used a rubber glove, which I always use in doing rectal work, or rectal examination. The finger which I used to insert in his anus was well lubricated, and I had a great deal of difficulty in getting that

finger into his anus. He had an anus which was much more rigid than the normal and I worked quite a while to make the insertion into that anus. It was impossible to get two fingers in without his going off from the table.

Q. What complaint, if any, did he make of pain?

A. He threatened to get up and leave if I did not stop hurting him. I made an examination of the lower part of the large gut; found that well filled with stool matter of good consistency. In other words, it was all the way it should be. When I withdrew my finger there was less stool matter followed my finger than usually follows my finger in examination of rectal matters. At the time of the examination he wore a napkin or cloth which he said at first he had had on four days, but latter he changed that time to two days. And that cloth had less stool matter on it than most people have with nothing the matter with them will have on their shirt.

Q. How long were you examining him?

A. He had waited for fifty minutes and then I was examining him for an hour and a half, that would be two hours and twenty minutes. What, if any passage did he have during that period of time?

A. He had none.

Q. What other evidence was there of lack of control of his bowels?

A. None whatever.

Q. Describe the sensation at the rectal opening.

A. To see whether or not these muscles were paralyzed we usually use a sharp instrument, a pin or some other instrument with a sharp point to prick the muscle. Sometimes we use electricity there also; if we don't get the contraction of the muscles of the skin by the use of other means, we use electricity. In this case I used simply just a knife we had with a very sharp point, and every time the point was applied to the muscle around the opening or the outside of the scar the muscles reacted.

Q. Describe it if you can with your hand how the muscle would act.

A. Well, it is just as I described it in the shoulder. You  
214 irritate any muscle and the muscle will contract or shut down. All these muscles contracted.

Q. What, if any, claim did the patient make to you as to whether he could feel touch or not when you were making these tests?

A. Well, he threatened to get up off the table and leave the office if I did not stop.

Q. What was the physical condition at the time you examined him, of the outer sphingster?

A. The outer sphingster I regard as not being complete.

Q. What do you mean by that?

A. I mean that at the time of healing there was probably some infection that destroyed part of the external sphingster.

Q. How does that affect the real control of his bowels?

A. Nothing at all. It has practically nothing to do with it.

Q. Describe that.

A. The internal sphingster is the muscle inside, the biggest strong-

est muscle of the two, is the one that is adapted for shutting off the stool matter. The other sphingster, of course helps, but it can be gotten along without very easily and very frequently and in fact in practically every case of fistula the external sphingster you got to leave alone. Nobody pays any attention to it, anyway.

Q. What is the result when such an operation is performed?

A. Why we have no condition after the thing is healed up.

Q. The ability to control the bowels is the same?

A. Just the same.

Q. Did you find whether he has any incontinence of the bowels?

A. No; had no incontinence of the bowels at the time I made the examination. In a case of incontinence you take a look at him clear across the room and you can tell whether the man has incontinence; don't need to feel of him or anything else, you can see it. You can tell it as far as you can see it. But this man had no such condition of the anus as that. He had an anus which was difficult to enter.

Q. In your opinion, then, doctor, what do you say as to whether he has any permanent injury or condition with reference to his rectum or his bowels?

A. I should say he had no injury at the time I examined him, at all, except the old scar.

Q. Could you describe what other part of his anatomy you examined?

A. I then examined his left hip. He complained of pain about four inches down about the front part of his thigh, or upper part of the leg and a little to the outside; about down in here (indicating).

215 Q. Where, doctor, is "down in here"?

A. On the outside of the thigh and about five or six inches below the hip joint. And he also complained of some tenderness at that place. So that, for that reason I made an examination of the hip.

The motions of the hip were all right in every direction; were normal in every direction. He would complain of pain and resist at first; when his attention was called to something else, we always got the motion that we were after. During this examination I made tests of the various nerves and found them all normal; all the way they should be. During this examination I had him lying flat on the table with his knee and hip joint straight out; in other words, he was lying flat on his back. At that time I applied blows to the soles of his feet, to his heels.

Q. Describe how.

A. This is the sole of the foot, and this the heel. I would hit his heel in that way (indicating).

Q. How hard?

A. I judge about twenty or twenty-five pound blows. And he complained of absolutely no pain in the hip at all at that time.

Q. If there had been an injury there to the hip joint or an impacted fracture or some such injury would the test which you just described have indicated it?

A. Well, if a man limps because of pain in his hip joint a blow

on the sole of the foot would probably give him the same condition that obtains when he was walking, and if there was such an injury there I should think a blow on the sole of the foot would certainly produce it.

Q. What else did you do with reference to movement of the limb?

A. The movements were the same as they should be. The movements in all directions were normal.

I made an X-ray plate of his hip and the X-ray plate shows a normal hip joint; no fracture whatever. The relations in the hip were normal, that is, the hip bone was what it should be and the different parts and muscles were where they should be.

Q. What, if any, shortening did you find of the left limb?

A. There was no shortening in either limb.

Q. If there had been a fracture or an injury to that hip what condition along that line would you have found?

A. Well, when you get an impacted fracture—impacted is where the bone is driven into itself—you may get an impacted fracture of the bone and the bone still hold its place, or position and not give any shortening which would be noticeable, might get only a quarter or half an inch shortening but an impacted fracture that  
216 would hold a man up within 24 or 36 hours or all day after the injury would certainly have to be great enough to produce marked shortening in that limb.

Q. Now I will ask you to give the measurements of the left hip. Did you take any measurements of that, doctor?

A. I did.

Q. I wish you would give those measurements.

A. (Consulting his notes.) The circumference of the left thigh was 21 inches; of the right thigh 20 and  $\frac{3}{8}$  inches; of the left calf was 11 and  $\frac{3}{8}$  inches; of the right calf, 11 inches.

Q. What do those measurements indicate, doctor?

A. In this particular case the measurements of the injured limb were greater than those of the uninjured limb. Usually the measurements of the right side are a little larger than those of the left side.

Q. Did you make any test of the nerves or muscles in that region?

A. Made the same tests of that hip from the hips down to the toes, as we did of the shoulder. In other words, heat, cold, touch, pain and electrical tests. And at that time they were all normal.

Q. Did you find any wasting of the muscles?

A. Found no wasting of the muscles at all.

Q. Color of the skin?

A. All things were normal, color of the skin, hair, toe nails, temperature, moisture, were all as they should be.

Q. Did you describe the way you had him on the table when that—when those tests were made?

A. I did.

Q. Describe his walking with a cane, if you noticed him at that time when he came into the office, and since that time down to today, whether or not it would indicate a condition there that was abnormal.

A. When he walked into the office he walked limping on the right leg.

Q. Illustrate it to the jury.

A. He carried a cane (witness stands up and walks back and forth).

Mr. Gray: He can take Mr. Kinzel's cane. (Handing to witness.)

A. He walked into the office limping on the——

Q. Which hand did he have the cane in?

A. I don't remember about that.

Q. Which arm was hurt?

A. The right arm. I remember I noticed him before I knew where his injuries were, that he was favoring the right leg  
217 Q. In what way did he use the cane?

A. He would use the cane in this way (indicating).

Q. Well, with an injured right arm he would have the cane in the left hand, I presume.

Mr. Gray: I suggest all these suggestions to the witness are not necessary.

The Court: No.

Q. How have you seen him in relation to walking with the cane since?

A. I have seen him two or three times. I think one of those times I saw him again favoring the right leg.

Q. Instead of the left?

A. Instead of the left.

Q. Yes. Did you take an X-ray plate of his hip?

A. I did.

Q. Have you that with you?

A. I have.

Q. I wish you would present it, produce it and show it to the jury and what condition it reveals if at all.

(X-ray plate was produced by the witness and placed in the X-ray box.)

Mr. Gray: There is one right in there. Leave that in and let the jury see both together.

(The other plate is removed from the box before putting this one in.)

Mr. Gray: You have no room for both of them?

(The X-ray plate produced by the witness was marked for identification "Defendant's Exhibit No. 8.")

A. I now identify X-ray plate marked defendant's exhibit No. 8.

Q. What does that defendant's Exhibit No. 8 show?

A. It shows a normal hip joint. This is the hip bone—I will change that—iliac bone, which is called the hip bone very fre-



quently. This is the head of the thigh bone which forms the joint with the large pelvic bone. And this shadow in here, this dark space shows the joint cavity. In other words, the head of the bone is filling up the joint so much that all you see is a little narrow strip. Then this bone is as they should be, the pelvic bone is as it should be, and the thigh bone is as it should be.

A juror:

Q. This up here at the top, there's a bone there that——

A. That is all normal; this is what are called tuberosities. They are for the purpose of muscle insertion, the muscle comes down here and is attached here, or inserts into these tuberosities. There is nothing abnormal about this, it is simply a little projection and is like a good many other parts of the body you frequently get a little bony growth that don't belong there. Shows no fracture. There is no shadow in that. If there had been a fracture in the last few months, you could see lines running through it.

Q. Then you find nothing in that plate that indicates anything other than normal with reference to his hip joint?

A. Nothing at all.

Q. Now have you illustrated everything about the plate which would indicate anything whatever out of the ordinary in relation to the joint there?

A. I have.

Q. Now plaintiff's exhibit, have you the doctor's exhibit C? Put that in and see whether this abnormal condition is there due to an injury and explain that plate and state whether you find anything about the hip joint which would indicate an injury to it.

A. There is absolutely nothing shown in that plate to indicate anything whatever out of the ordinary.

Q. Doctor Shepherd pointed to this little bony structure extending out from the joint as he indicated on the plate, what is that on the plate?

A. That is, as I explained a few minutes ago, as a little bony projection which sometimes occurs in bones where there has never been any accident. It occurs in normal hips frequently, hips where there has never been any kind of an injury and is not a fracture or the result of a fracture.

Q. Have you any plates of normal hips showing that condition which appears in the plate plaintiff has introduced by Dr. Shepherd?

A. I have.

Q. I will hand you three plates here and ask you to show these plates and tell the jury whether they are from a normal or abnormal person.

Mr. Gray: Tell the jury whom they were taken of.

Mr. Korte: I object to that.

Mr. Gray: Then I object to their being shown to the jury.



Mr. Korte: It is simply a matter of how the doctor feels about it; if the doctor feels like telling why just go ahead.

A. This is the plate of Mr. A. Downey.

Q. Show the jury the condition which appears in there that appeared in Dr. Shepherd's plate.

A. This little projection out here appears in this plate, sticking out down here.

Q. Just point out—Does that plate show a normal hip?

A. Yes sir.

219 Q. Where is this bony structure appearing in the plate of the normal hip?

A. Right here.

(Said plate identified by the doctor as being one of Mr. A. Downey, was marked for identification Defendant's Exhibit No. 9.)

Q. Take Mr. Kinzel's plate, the one showing Mr. Kinzel's hip joint, plaintiff's Exhibit C, does it show any fracture of the hip joint?

A. It does not.

Q. Now, then, take plaintiff's Exhibit C, introduced by Dr. Shepherd, and tell the jury whether or not that shows any fracture of the hip joint or any fracture of the bones in that region.

A. It does not.

Q. Does the plate shown to the jury as defendant's Exhibit No. 9, of Mr. Downey's hip, show the same condition as you find in the plate of Mr. Kinzel, Exhibit C, introduced by Dr. Shepherd?

A. Well, it does not show all the things that are shown.

Q. With reference to the hip joint is what I am speaking of.

A. Yes.

Q. It does?

A. Yes, sir.

Q. Have you another plate showing a normal condition of a man having reference to the hip joint, besides Mr. Downey's?

A. Yes.

(Produced and marked for identification Defendant's Exhibit No. 10.)

Mr. Gray: Whose is that doctor?

Q. What does Exhibit No. 10 plate represent?

A. That is another picture of a hip.

Q. Of whom?

A. L. Sanford, of Wallace.

Q. What does that plate show?

A. That plate shows about the same condition as the other hip plate.

Q. In relation to the hip generally as shown on Exhibit 10, that you now have, does that show the same condition that you find in the plate Exhibit C, the plaintiff's introduced by Dr. Shepherd?

A. It does.

Q. Have you another plate of a normal hip joint in your possession that you wish to show?

A. Yes, I have.

(Examines and finds he has not the right plate, after it was  
220 marked for identification.) I guess I have not got the other one with me here.

(The jury was duly admonished and court took recess for five minutes.)

After recess.

Q. I wish you would examine plaintiff's X-ray plate marked B, directing your attention to the excrescence or something, that is Dr. Shepherd's X-ray plate of the right shoulder joint. Tell the jury what effect whatever you see on there by way of some excrescence underneath the shoulder joint with reference to the mobility of the arm.

A. That would have nothing to do with the motion of the arm.

Q. Illustrate to the jury why it would not.

A. The arm motions are encompassed and take place within the circle starting from this point on the shoulder blade round below the head of the humerus or the arm bone and round the joint taking place between the arm bone and this part of the shoulder blade or the shoulder joint. This callous is—

Mr. Gray: Just point to what you call the callous, doctor.

A. Right down here (indicating on the plate) is below the shoulder joint, is perhaps, I should judge, an inch below the shoulder joint or three-quarters of an inch below, therefore it would have nothing to do with the motion of the Joint.

Q. Would it have anything to do with the motion of raising his arm outward or upward?

A. No, it would have nothing to do with that.

Q. With his arm here?

A. There is no interference with the joint.

Q. Where is the callous located?

A. The callous is located below the shoulder joint.

Q. What is there between the nerve and the bone?

A. The subscapularis muscle lies on the inside of the shoulder blade—the front side I should say. Now then, the nerve passes over that muscle so the muscle lies between the nerve and the bone; therefore unless the muscle was absolutely destroyed the callous could not affect the nerve.

Q. What effect would that have on the nerve, that callous?

A. I can't say that it would have any effect at all.

Mr. Korte: You can take the witness stand now, doctor. (The witness goes back to the witness chair.)

Mr. Korte: Defendant now offers in evidence Defendant's Exhibits Nos. 8, 9 and 10, being X-ray plates.

The Court: They will be admitted.

Q. What is the average length of time in which a fracture of the scapula heals in your experience?

221 A. It should heal in the same length of time as any other fracture, and should be absolutely healed in three months.

Q. Would a fracture of the scapula result in permanent——

A. The fracture of the body of the scapula is not considered important; there is no particular muscle, no muscles attached to it; not much attention paid to it ordinarily. A fracture of this part of the scapula is another thing. If you get a fracture down there you are likely to have trouble. What the plaintiff has is a fracture of the body of the scapula there about the middle of it.

Q. If the plaintiff has paralysis of the circumflex nerve, the one that controls the motion of the arm outward and upward, could he raise his hand above his head and yawn?

A. He could not.

Q. Could he carry an ordinary bucket in the hand?

A. Well, he could carry some weight with that hand all right.

Q. Any distance, say a block?

A. It would be pretty uphill work because if he had paralysis of the deltoid the pail would be bumping his legs every time he took a step, because the deltoid helps to hold the arm out. When carrying a pail of water he would have to hold the pail out from his body. I suppose it could be done but it would be a difficult proposition.

Q. Could he chop wood?

A. He could not raise his arm out from the body at all if he had paralysis of the deltoid; could not raise it out from the body.

Q. Have you found anything about this man's anatomy, his body, that indicates to you any permanent disability or inability to perform manual labor under conditions which you would find in a man normally having received the injuries which you found?

A. No. I have found nothing which would cause a permanent disability.

Q. If a man makes use of his arm as you would or any surgeon of experience would point out he should do, should he be able, should he have been able at this time to have made use of his arm so that he could do and perform manual labor?

A. I believe that if treatment had been carried out on that shoulder and arm he would at this time be in a condition to work.

Q. That is, with reference to the shoulder and arm?

A. Yes, sir.

Q. How about his other——

A. I found nothing absolutely wrong in the rectum or the hip.

222 Cross-examination, Dr. HANSON:

By Mr. Gray:

Q. Who is A. Downey?

A. He worked in one of the mines round here.

Q. When did you take that picture of him?

A. I don't believe the date is on it.

Q. What is 10-21 '16?

A. That was October 21st, 1916.

Q. How did you happen to take this picture on that day?

A. Whenever a man has anything that we think it's necessary, we make an X-ray picture.

Q. Was this one taken in the regular course of your practise?

A. Yes.

Q. Was that man lame?

A. No.

Q. Not at all?

A. No.

Q. What did he come to you for?

Mr. Korte: I have no objection unless there is something that should not be disclosed.

The Court: The doctor has his privilege whenever he pleases to take advantage of it.

Q. Did he come to you for treatment?

A. Yes.

Q. For any injury?

A. I think he had had a fall or a rock hit him; don't recollect exactly what it was.

Q. When was that?

A. I believe you have the date the 21st of October.

Q. Had he ever been to you before?

A. He might have, I don't remember.

Q. Don't you know that the man had had some injury at some time previously?

A. He didn't give it in his history.

Q. Don't you know it?

A. No.

Q. Did you examine the place?

A. Yes.

Q. Was there any evidence of any injuries to any of the bones of the hip?

A. No.

Q. That you could see?

A. No.

Q. You examined it for that purpose?

A. Yes.

Q. What is evidence of old fractures?

223 A. Callous.

Q. On the plate how does that show?

A. A new callous will show up there, show up light.

Q. How about the line of fracture; will that show?

A. Yes.

Q. That is shown by a shadow?

A. Shown by a shadow of—

Q. Now, Mr. L. Sanford; when did you take that plate?

A. I don't remember.

Q. It is marked 4-18-16.

A. April 18th, 1916.

Q. Had he suffered from any injury to his hip?

A. No, not to the hip.

Q. What injury had he suffered?

A. He got a blow on the side or thigh.

Q. Had that been injured previous to that time?

A. Not that I know of.

Q. Are those the only two hip plates you have taken in the period between April and this date?

A. No.

Q. How many more have you?

A. I couldn't say; good many.

Q. About how many?

A. It is not possible to say.

Q. Fifty?

A. Yes, probably that many.

Q. You looked them all over, I presume?

A. No, I did not.

Q. How did you happen to pick out these two?

A. I tried to pick out the normal plates which showed this condition.

Q. The other forty-eight, I suppose, are normal plates that don't show the same condition?

A. I suppose I could go through them and find some.

Q. Would you be willing to produce all those plates so we can go through them?

A. Yes.

Q. Will you do that at 2 o'clock?

A. Yes. I would not want those plates where I could not get them back.

Q. Something more sacred about those than about these?

A. Nothing sacred about any of them. I want to keep them in my files.

Q. Do you mean to say these represent the condition of normal hip bones?

A. Yes.

224 Q. What do you call them, these little tuberosids you speak of?

A. Sessmoids, or an unusual shape of the bone—

Q. Of unusual shape?

A. Yes, sir.

Q. How long does it take to take an X-ray picture?

A. Why, with the machine we have at the present time it takes about three minutes to take a hip.

Q. How long to develop it?

A. About twenty minutes.

Q. Would you be willing to take four of us who are sitting here and exhibit to the jury what a normal hip is?

A. Yes, I would be willing to do it.

Mr. Korte: It seems to me they might furnish them themselves.

Q. Would you do that between 12 and 2 o'clock?

A. No. I couldn't do it between 12 and 2.

Q. You could take the pictures and have them presented later?

A. Yes. I could do that.

Q. All right, I will have you do that if you will.

Mr. Korte: Include myself in that group.

Mr. Gray: I will take you and Mr. Elder.

A. I want to make myself clear. I don't say that projection occurs in all normal hips.

Q. No, I know you didn't doctor. In other words, you are protecting yourself a little; is not that true?

A. Not at all.

Q. Doctor, let us go back to your first examination. Are you a surgeon?

A. Yes, sir.

Q. Do you do any surgery?

A. Yes, sir.

Q. Is it not true that your associate, Dr. Smith, does practically all the surgery of any consequence?

A. It is not.

Q. At your hospital?

A. No, sir.

Q. You do the—a little temporary relief, primary relief, but Dr. Smith does the surgery?

A. I do all my surgery, all my major operations and all other surgery that comes to me.

Q. You said something about impacted fracture of the hip.

A. Yes, sir.

Q. Have you ever treated one of those?

A. One.

225 Q. How long ago was that?

A. It was in 1910.

Q. You said when this man first came to you in June, you observed a wasting of the muscle around the shoulder?

A. Yes, sir.

Q. What was the name of that muscle?

A. Supraspinatus.

Q. Did you observe any wasting of the deltoid muscle?

A. None at all.

Q. Or any other muscle thereabouts?

A. No.

Q. Did that indicate anything to you, the fact you found one muscle wasted and the others not wasted, to your mind as a surgeon?

A. It would indicate ordinarily that the muscle would show an injury, yes.

Q. What causes the wasting of a muscle following an injury?

A. Three things, lack of nerve supply, lack of use and general bodily disease or disease of the general muscles—There are four things, interference with the nerve supply, injuries to the muscle itself, disease in the muscle or general bodily disease.

Q. All right. Which did you attribute this to?

A. To an injury to the muscle.

Q. To an injury to the muscle itself?

A. Yes.

Q. Is that a permanent injury, doctor?

A. That I could not say. The muscle reaction to electric stimulation showed the nerve supply was all right; and therefore it is likely it will come back.

Q. Within what time after injury should it come back?

A. Six months after the arm is brought down into use.

Q. How long would that be following an injury such as you found in this man?

A. What was that?

Q. How long would it be before it should come back following such an injury as you found in the shoulder of this man?

A. It all depends upon how long his shoulder was in splints or casts, whatever it was in. If it was in six months, probably it would not be back for six months after that.

Q. Suppose it was not in a cast at all?

A. If he didn't use it it would never come back.

Q. Did it occur to you that lack of use don't show up in but one muscle?

A. Yes.

Q. You did not observe any wasting except in one muscle?

226 A. I did not.

Q. Didn't that indicate to you that so far as the other muscles could have been used they had been used?

A. Yes.

Q. Yes. Now you said something about using the battery on this man. For what purpose did you do that, doctor?

A. To find out the condition of the muscles.

Q. What kind of a battery did you use?

A. I used our battery; I used galvanic wall plate.

Q. What is that and what kind of a current is used there?

A. The electric current of the wall plate is a combination of motors, has facilities for speeding up the current and getting different amounts of current.

Q. What's the purpose for the use of this current?



A. It has a great many purposes.

Q. The use you make of it?

A. It is used in muscle and nerve reaction, the galvanic current is used in muscle and nerve reaction and it is used a great deal in treatment.

Q. Now how do you determine, how do you examine by the use of this galvanic current, doctor? Just make that a little plainer.

A. You aim to apply one electrode to the area of injury, the nerve or along the trunk of the nerve some place, and the other end to all parts of the muscle wherever you want to get your reaction, in case reaction is there.

Q. What do you mean by reaction?

A. Reaction is a contraction of the muscle cells which make the muscle fibre get shorter, bulge up.

Q. What does that indicate?

A. It indicates that the nerve supply is all right and that the muscle cells themselves are in good condition.

Q. Is that something that you can see?

A. Yes, sir.

Q. Now in testing this man, that is what you did, is it?

A. That is one of the things I did.

Q. Did you do that to both his right and left arm?

A. Yes, I did, and in comparison one with the other.

Q. With the same current applied?

A. Yes.

Q. Were the reactions different on the different arms?

A. They were not.

Q. They were just the same?

A. Yes, sir.

Q. And that is something that we can see?

A. Yes, sir.

227 Q. Now, if there is something the matter with the nerve supply, how does the muscle act when you apply the electrode?

A. It depends upon what the condition of the nerve is. If you have nerve excitability the current applied to the nerve, the muscle would make it jump that much harder. If you have a nerve injury with destruction of the nerve fibre you will have less reaction or no reaction at all.

Q. With this man there was no lessening of the reaction?

A. There was no lessening of reaction anywhere except the atrophied muscle.

Q. There was no lessening whatever of the deltoid?

A. No.

Q. In other words, that means muscle spasm, jerking of the muscle; is that it?

A. Yes, when the electrical current is applied to the muscle.

Q. What current did you apply?

A. The galvanic and the galvano-paratic.

Q. What was the voltage?

A. Twenty volts and twenty mille amperes.

Q. You say you were able to make him raise his arm six or eight inches?

A. Yes.

Q. In what direction?

A. Out; this way (indicating).

Q. What do you mean by 6 or 8 inches? Does it extend up or—  
Show the jury where did you get this 6 or 8 inches.

A. (Holds his arm up.)

Q. Where is the 6 or 8 inches, in here or in here?

A. About in here, I should judge (indicating).

Q. In here about the elbow?

A. Yes, sir.

Q. Where did you measure it?

A. I didn't measure it.

Q. You got 6 or 8 inches?

A. Yes, sir.

Q. How much current would it take to put the arm up 6 or 8 inches?

A. The same—Some people twenty mille amperes would make them draw the arm with a sudden jerk clear over, with other persons you get a shorter contraction of the muscle fibre.

Q. A current movement of that size would be very painful?

A. A current that would cause that kind of movement?

Q. Yes.

A. Yes, it probably would, but might not be painful. But some people are very susceptible to electricity; more than others.

Q. Would not the galvanic current cause reaction even though the nerve supply was entirely cut off?

228 A. No, sir.

Q. It would not?

A. No.

Q. You said that the circumflex nerve supplied the lower one-third of the deltoid muscle?

A. Two-thirds.

Q. The lower two-thirds, is that what you said?

A. I intended to say that if I didn't.

Q. What did you say about the supply of the upper—

A. The upper one-third is supplied by the nerve which comes off from the cervical plexus.

Q. What is the name of that nerve?

A. I can't recollect the name of it just now.

Q. What's the name of the branches?

A. The branches are skin branches.

Q. Do those branches, the skin branches, supply that muscle?

A. Not of that nerve.

Q. Do they supply the muscles, any of these skin branches?

A. Well, the nerves——

Q. Answer yes or no.

A. I can't answer yes or——

Mr. Korte: He said he could not answer yes or——

A. I was trying I could not answer without explaining.

Q. Answer yes or no and then give your explanation.

A. I can't answer yes or no.

Q. All right. Tell us about the circumflex nerve.

A. The circumflex nerve comes off from the——

Q. Comes from the sacro-ileac joint?

A. That is force of habit, I expect—from the plexus under the arm, the back part of it, and passes over to the shoulder blade and passes up behind the head of the humerus. The other branch passes around the head of the humerus and supplies the deltoid muscles.

Q. That is the lower two-thirds?

A. Yes, sir—all of the deltoid muscles.

Q. Now, is it not true that on your direct examination you said it supplied the lower one-third of it, in your first examination and now you have got it supplying the lower two-thirds?

A. I didn't say anything of the kind.

Q. What did you say?

A. I said the skin of the upper one-third of the deltoid—covering the deltoid muscle was supplied by an entirely different nerve from the circumflex.

Q. Did you not, on your direct examination, tell the jury that the circumflex nerve supplied the skin of the lower two-thirds of the deltoid muscle?

229 A. The circumflex, I said branches of the circumflex nerve supplied the skin of the lower two-thirds—covering the deltoid muscle.

Q. Didn't you tell the jury on direct examination the lower one-third of that muscle itself?

A. If I did I corrected that a moment ago.

Q. What did you say. I am talking about the muscle.

A. I am talking about the skin.

Q. I have been talking about the muscle all the time.

A. Then I will tell you about the muscle. The upper or larger branch of the circumflex nerve supplies the deltoid muscle.

Q. What does the smaller branch supply?

A. The skin covering the lower part of the deltoid muscle.

Q. What other muscles are supplied by the circumflex nerve, if any?

A. Usually the whole supply is the deltoid, although once in a while branches are given off—There is a small branch goes to the shoulder joint itself; sometimes other branches are taken in, not universal.

Q. Different in different people; is that the idea?

A. It occurs that way.

Q. Any other muscles supplied by the circumflex nerve?

A. Not that I remember.

Q. Your testimony is based upon your study of anatomy?

A. Yes.

Q. I understood you to say that there was some muscle between the circumflex nerve and the shoulder joint?

A. No. I didn't say the shoulder joint at all.

Q. Well, between what?

A. There is a muscle occurring between the scapula—

Q. You said it was the super-scapular?

A. I did not. I said it was the subscapularis.

Q. You said you examined Mr. Kinzel's rectum?

A. Yes, sir.

Q. And with difficulty you inserted one finger lubricated into his anus?

A. I did.

Q. If three fingers could be inserted there without difficulty it would be a surprise to you would it not?

A. It certainly would, yes, sir.

Q. Apparently there is considerable difference in that respect which could be made the subject of ocular demonstration; is that true?

A. I didn't get your question.

Q. Difference between you and Dr. Shepherd and Dr. Marshall. They say they can insert three fingers clear up to the hand  
230 without any lubrication at all and that there is a change and a loosening or injury of the first string, I may call it; but you were not able to find any such condition?

A. I was not, no, sir.

Q. And you also found by your use of the battery that this deltoid muscle was perfectly normal so far as your investigations could determine?

A. Yes.

Q. The reaction was the same to all current as the deltoid muscle of the other arm?

A. Just the same. I could not see any difference.

Q. Both the peratic and the galvanic?

A. No, peratic and galvano-peratic.

Q. What is the galvano-peratic?

A. It is a merger or a mixture of the two currents, galvanic and peratic.

Q. Did you have the peratic?

A. No.

Q. Didn't use that?

A. No.

Q. You know how it would act?

A. Yes, I know.

Q. How would it act?

A. It would act the same as the galvano-peratic.

Q. You say the peratic and galvanic both react the same?

A. No, I didn't say that, but the galvanic current is applied and the peratic is switched in; about the same reaction took place in both of them. The only test which we make of these muscles was the power of contraction.

Q. What is the peratic current? What is it used for?

A. The peratic current is used principally in treatment.

Q. Principally in treatment?

A. In muscle contraction.

Q. Why did you switch that with the galvanic in this case?

A. To see if there would be any more violent contraction. But the peratic current hurts more than the galvanic.

Q. Is the peratic current used in any other than tests of nerves?

A. Yes, sometimes.

Q. You didn't do it, though?

A. No, I did not, not alone. I never use it.

Q. What is the reaction of regeneration?

A. I don't remember.

Q. Where did you get this information you have been giving; from Dr. Bouffleur over there? He was with you was he not?

231 A. It is not necessary for me to get my information for this examination from anybody. I got it from my own work, and from observation and not from any suggestions or any ideas from anybody.

Q. Is there not some reaction with which you are acquainted that distinguishes between an injury to the muscle itself and an injury to the nerve which supplies that muscle?

A. Yes, there is.

Q. What is the name of that?

A. I don't remember that.

Q. What is it? Describe it? Describe the reaction and how you get it.

A. I just stated that I did not remember that reaction.

Q. Can you tell then, in making your tests, making your examination, whether it is an injury to the muscle if there be one, or an injury to the nerve, if there be some peculiar reaction present?

A. Oh, yes, that is easily done.

Q. You said a minute ago you couldn't tell.

A. You were asking me for some method which I didn't know.

Q. I was asking you if there was not a reaction, if there was a difference in the reaction as the result of nerve or of muscle injuries.

A. In the first place, you would have the history of the injury which is part of your examination——

Q. Leave the injury out.

A. It is part of your examination, so you couldn't leave it out.

Q. Just leave that out from the electric examination.

A. In the electric examination you could not get any passage of current through a nerve if there was a nerve injury.

Q. Can you get a contraction of the muscle?

A. No, not without nerve supply you would not get contraction of the muscle.

Q. You take into consideration in determining the results of these reactions, the history of the case, would you, doctor?

A. Oh, yes.

Q. If there was no response of the muscle upon application of the current, that would indicate to you that there was nerve injury, would it?

A. If there was no response of the muscle?

Q. Yes.

A. Not necessarily. The muscle cells might be destroyed.

Q. How do you explain to the jury the statement you made a few moments ago to the effect that if the nerve was entirely destroyed that there would be no muscular reaction?

A. That is exactly what I meant; that if the muscle had no nerve supply you would get no reaction. You can get a muscle  
232 out of the body and apply the electrical current and get reaction and that is because there is still nerve impulse present still, and the nerve tissues carry that impulse to the other end of it. But if the muscle cells were destroyed you could have no nerve contact and no reaction.

Q. Which was it in this reaction that you saw?

A. Partial destruction of the muscle tissue itself.

Q. How are you able to determine that, doctor?

A. Atrophy, the substance of the muscle gone and no atrophy or wasting of the muscles supplied by the rest of the nerves.

Q. If the deltoid muscle was in good condition so far as the application of the current was concerned, at the time you examined it, it would be in as good condition today in all probability, would it not?

A. No, it would not, necessarily.

Q. Unless there had been some intervening injury?

A. No, it has atrophied since.

Q. It is getting worse?

A. Certainly. He is not using it; it has been getting worse.

Q. Are the other muscles outside of the shoulder cap muscle, getting worse?

A. He had more atrophy, more wasting than he had June 5th, when he was here yesterday.

Q. What kind of atrophy is that?

A. I couldn't say. I should judge it was atrophy from disuse.

Q. Well, notwithstanding the disuse, you are able by the use of the electric current to determine whether there was muscle or nerve injury, are you not?

A. Yes, sir.

Q. If applied today, as well as it could have been done last June?

A. Yes, sir.

Q. Are you willing to assist Dr. Shepherd in determining by this test before the jury?

A. I am willing to make my own tests, Mr. Gray.

Q. To show what the condition of the muscle is, do you object to being assisted by a doctor who represents the plaintiff?

A. I would not object to his being present.

Q. And you would not object to his using the apparatus in demonstrating before the jury, would you?

A. Well, I would not want him to use it for me.

Q. You would not object to his using it, would you?

A. No.

Q. Doctor, the question of whether or not your observation and recollection with reference to the insertion of one finger into the anus is correct, or whether three can be easily inserted, is, also, a matter that could be demonstrated, is it not, to the jury?

233 A. Yes. Three can be inserted.

Q. Oh, three can be now. I thought you said only one could be.

A. Easily, you said?

Q. Easily, yes.

A. My opinion is they could not be inserted at this time, easily.

Q. It is something that could be shown to the jury, is it not?

A. I think so.

Q. And they could determine whether your and the other Drs.' recollection and examination of the matter of—

Mr. Korte: I object to it as not proper cross examination.

Mr. Gray: There is such conflict in this testimony I am going to ask at the incoming of court this afternoon—

Mr. Korte: My objection goes to all this, Your Honor.

Mr. Gray: —At the incoming of court this afternoon and at a convenient place, in presence of Your Honor and the jury and everyone, we may have this demonstration that we may determine who is attempting to impose upon this jury.

Mr. Korte: That's exactly what we want.

Mr. Gray: I am willing that Dr. Shepherd shall represent us and Dr. Hanson represent them.

The Court: Very well. It can be ordered at 1.30 p. m.

Mr. Korte: Of course that must be under normal conditions to be determined in advance.

Mr. Gray: Well, Dr. Hanson will represent you and Dr. Shepherd represent us, one doctor for each side.

The Court: Yes.

Mr. Korte: I understood, Your Honor, that Dr. Bouffleur was to be present.

The Court: I shall allow him to be present. I want Dr. Hanson and Dr. Shepherd to make the examination. Let Dr. Bouffleur be present without lawyers. He can have any other doctors you want.

At this time the jury was duly admonished by the court and excused until 1.30 p. m. today, to which hour court took recess.

The Judge was called in by counsel and the following occurred.

Mr. Korte: I just wanted Mr. Kinzel to keep away from any other doctor in the meantime.

The Court: Yes. That is all right.



Thursday, November First, A. D. 1916—,

1.30 p. m.

At this time, present as before, the jury being all present, the trial of this cause proceeded as follows:

The Court: Are you ready to make your examination now?

Mr. Korte: I understood Dr. Hanson was to make the examination; do not need any demonstration or anything of that kind.

234 Mr. Gray: I thought that was the understanding that the doctors were to use this apparatus to show——

The Court: To show the person of the plaintiff.

Mr. Gray: Operate with the battery.

Mr. Korte: Going to experiment with the battery? I object to that on cross examination of this witness.

Mr. Gray: I thought it was understood that—I asked Dr. Hanson if the battery would show this. I thought it was understood that this experiment would be made.

Mr. Korte: I object to his interfering with my case on cross examination.

Mr. Gray: These two things were to be determined, the effect of the use of the battery and, also the examination of the rectum.

The Court: No. I understood they were going to examine and demonstrate the condition of the rectum.

Mr. Gray: I asked him if this could be shown by the battery before the jury and he said it could. I asked him if he had any objection to demonstrating it before the jury; asked him if he had any objection to Doctor Shepherd doing it. He said he objected to Dr. Shepherd doing it, but would do it himself. Now in this——

Mr. Korte: I object to argument upon this matter.

The Court: No argument is employed.

Mr. Gray: I asked if this—I ask that this demonstration be made.

Mr. Korte: It is not cross examination. It is interfering with my conduct of the case.

Mr. Gray: The idea is to get the facts before the jury.

The Court: Mr. Gray, this is interfering with the orderly course of the case. Counsel consented that it might be done, but I shall have to, in the face of his objection, defer it until counsel is through with his part of the case, and then order the examination. I shall have to do that although it may be an inconvenience.

Mr. Korte: I object to any further demonstrations, because they have proven their case and now I am proving mine and it is for the jury to pick which state of facts they believe. Now to go into all this thing again it seems to me is unwarranted and I shall object to it on that ground.

The Court: I shall sustain your objection as interfering with the orderly progress of the case. But when you consented, I allowed it.

Mr. Korte: I have no objection to the examination of the anus. I did not object to it and do not object now, but I do object now to any further demonstration here to confuse the jury.

235 The Court: I shall allow you to proceed with your case and they can have this examination in rebuttal.

Dr. LEONARD E. HANSON resumed the stand for further

Cross-examination.

By Mr. Gray:

Q. It is your opinion, doctor, that this man has not suffered such an injury to his shoulder or the nerves around or bones thereabouts, as to interfere with his performing manual labor?

A. Why it is interfering with him now, yes, but I don't believe it should be at this time.

Q. You think it is because he has not used it?

A. I do, yes.

Q. Nevertheless the condition is there at the present time, is it not, that he describes?

A. It was not there on the 5th of June. I can't say about it now.

Q. It has changed between then and now, has it, so what the jury saw yesterday is not what you saw in June? Just answer that yes or no.

A. State it again, please.

Q. What the jury saw yesterday in this man's shoulder and arm is not what you saw in June?

A. The atrophy of the deltoid was not there at all in June and the atrophy of the muscle is more pronounced now than it was.

Witness excused.

ARCH E. CAMPBELL, a witness for the defendant, was recalled and testified on

Direct examination.

By Mr. Korte:

(Paper marked for identification Defendant's Exhibit No. 11.)

Q. I hand you defendant's Exhibit No. 11 and ask you what it is if you know.

A. It is a copy of special order No. 1 issued at Malden, October first, 1914.

Q. Referring to what with reference to bridge at 140 and 142?

A. Relates to restricting speed of trains; it says nothing about Bridge- 140 and 142, but the speed is simply every bridge.

Q. Was there a subsequent order to that?

A. Yes, sir. This was re-issued each month.

(Another paper marked for identification Defendant's Exhibit No. 12.)

Q. I hand you defendant's Exhibit No. 12. What is that?

A. Special order No. 2, issued February 5th, 1916, which was in effect at the time of Mr. Kinzel's injury.

236 Q. That relates to the speed of trains over bridges 141 and 142?

A. Yes, sir. It includes that item with those that are issued.

Mr. Korte: I offer in evidence these two orders, marked for identification defendant's Exhibits No. 11 and 12.

The Court: They will be admitted.

Q. One question with reference to where you understand the dirt is dumped. I wish you would tell in a general way how an air dump car is operated in reference to unloading it whenever they do unload.

A. (The witness illustrates by the model the manner the dirt is dumped, from the dump car.)

Q. The man who dumps is on the ground on the side of the car?

A. Yes, sir.

Q. On which side?

A. He is on this side if the car dumps that way.

Q. That is the way they dump the car?

A. That is the way, where the power of the air that is connected to the train and through the air hose, to the dump cylinder.

Q. Is that operated from the rear end of the train or from the engine?

A. It is operated from the engine.

Q. They go along the side and dump the car?

A. Yes, they unhook these chains here then it dumps automatically on the opposite side from where the men are standing. It dumps with the power of the air from the engine.

Q. When you right it what do you do?

A. When they right it, they connect the two air hose on the dump line at the end of the train and put the air through that dump line between the engine and the loaded car which operated the dump cylinder and straightens the car up and then you go along and replace the chains that they unhook before dumping. You see the cars are dumped by the men going along and unfastening these chains here and then they dump automatically. (Indicating by the model.)

Q. When it is dumped of course there are no men on the top of the load?

A. No, neither on top or on the side that it dumps on.

Cross-examination, ARCH E. CAMPBELL.

By Mr. Gray:

Q. Where is the order reducing that to four miles an hour?

A. I have no knowledge of any four mile an hour order.

Q. The idea of reducing speed orders is, they give them when they are working on the bridge?

237 A. And sometimes in other cases of special reason. The special reason for this order was on account of the work going on there in that vicinity.

Q. In regard to dumping this car just simply dumps itself?

A. Yes. It is loaded heavier on the side they dump. They right it with air.

Q. The air hose has to be operated of course when they right them?

A. No. They have a little contrivance which they call a bag-pipe, a nick name for it.

Q. In order to have tail air hose on there, they would have to go to the trouble of uncoupling the tail air hose and uncoupling this when they went to right the car, would they not?

A. No. The tail air hose, would not be attached at all to this dump line. It would be attached to the train line. There are three air lines and three air cylinders.

Redirect examination, ARCH E. CAMPBELL:

Q. When you coupled up to the dozer what would you do with the tail air hose?

A. You would have to take it off.

Q. You would have to take it off to couple up the air on the dozer?

A. Yes.

Mr. Gray: That is leading and suggestive.

The Court: The objection is overruled.

Mr. Gray: I just wanted to show who was testifying.

Mr. Korte: I always tell the truth, anyhow.

Mr. Gray: It is not customary in pushing that dozer back to couple onto the dozer, is it?

A. No, they don't ordinarily do it.

Mr. Korte: But they do that, don't they?

A. Yes, they do, and they don't. Sometimes they couple on and sometimes not.

Witness excused.

Dr. TRACY R. MASON was called and being duly sworn as a witness on the part of the defendant testified as follows:

Direct examination.

By Mr. Korte:

Q. State your full name, doctor?

A. Tracy R. Mason.

Q. How old are you?

A. Nearly forty-two.

Q. How long have you been practicing your profession as a physician and surgeon?

A. A little better than eighteen years.

238 Q. From what school are you graduated, doctor?

A. I graduated from the American Medical in St. Louis in '98; and Bennett Medical, Chicago, in 1905.

Q. Been practicing continuously since you graduated?

A. Yes, sir.

Q. During that period of time you have stated have you had experience with injuries due to violence?

A. Yes, sir.

Q. You examined the plaintiff in company with Dr. Hanson did you?

A. I did.

Q. When was that?

A. June 5th, I think, 1916.

Q. What was the purpose of that examination?

A. To find out the condition of Mr. Kinzel.

Q. Tell in your own way from the time Mr. Kinzel came to you how thoroughly you examined him, if you started in from head to foot, and give the preliminary facts, if any.

A. I helped examine Mr. Kinzel with Dr. Hanson and Dr. Bouffleur in Dr. Hanson's office, June 5th, 1916. The man was stripped and examined from head to foot.

I guess perhaps I better start with the shoulder and go down and get at it in that way:

The shoulder was examined and I believe that there was quite an atrophy of the muscle over the scapula, an atrophy over the deltoid muscle. We proceeded to raise the arm and the patient complained and resisted the movements of the arm at times, but we did manipulate the arm forward, backward and upward. I guess the arm was raised to about that height (indicating).

Q. With reference to the shoulder, to get it into the record.

A. About level with the shoulder, but he complained of pain during that manipulation and resisted. Then we took up the nervous condition of the shoulder by using different methods, heat and cold tests, used electricity and used a sharp instrument over the tissues. The reason that we did this was to find out the condition of the

tissues there in regard to their reflex, to find out if the muscles would contract and to find out if there were any nerves in that particular locality that were not performing their functions.

Q. What did you find?

A. We found from that examination that there was contraction of the muscles from the arm down, the fore arm, we found slight atrophy of the muscle over the scapula.

Q. Did you make any measurements of the arm, doctor?

A. Yes, sir, we took measurements of the arm.

Q. Refer to your notes made at the time, doctor?

239 A. Measurements of the shoulders and arms. (Examining his notes.)

Mr. Gray: May I cross-examine him concerning these notes?  
The Court: Yes.

Cross-examination on the notes.

By Mr. Gray:

Q. You made these right at the time?

A. Yes, sir, that was made at the time.

Q. Who made it?

A. I made that—marked down as the doctor called them off to me. This was written up afterwards.

Q. Where are the original notes?

A. They were all on little pads.

Q. You did the marking yourself?

A. I did the marking of these measurements there.

Q. Who made the measurements?

A. Dr. Hanson.

Q. Who else was present?

A. Dr. Bouffleur.

Q. Of the Milwaukee Company?

A. Yes, sir.

Q. What did he do?

A. He didn't do anything but sit round there.

Q. Did you make the copy yourself?

A. No, sir, I did not.

Q. Did you compare it with the original?

A. No, I did not.

Q. Who made this copy?

A. Dr. Hanson.

Mr. Gray: I object to Dr. testifying from these notes.

Direct examination resumed.

By Mr. Korte:

Q. Do you remember the measurements so you can say this memorandum there, these memoranda there are the truth?

A. I remember—

Mr. Gray: I object to his making any use of the memorandum as not made by himself, memorandum made by another party.

Q. Did you or not determine whether these measurements are truthful or not?

Mr. Gray: I object to the use of the memorandum.

The Court: The objection will be sustained.

Q. Have you anything from which you can refresh your memory without the use of this memorandum?

A. All I remember about the measurements made at that  
240 time is that they were practically the same, that's all I can remember. The measurement of the legs was practically the same.

Q. Go ahead from there, then and tell what you did.

Mr. Gray: Do not use the memorandum, doctor; that has been ruled out.

Q. State what you did after you made the measurements. You measured both arms, of course, did you not?

A. Yes, sir.

Q. You found them practically the same. Now what, if any atrophy did you find in the muscles of the shoulder or the arm?

A. I said I found a slight atrophy of the deltoid and the muscle crossing the scapula.

Q. What did you find the temperature of the skin?

A. It was normal.

Q. And the color?

A. Normal.

Q. Did you state whether or not you made any tests with reference to the nerve of the arm, say the circumflex nerve, found paralysis there?

A. We found by different tests that I mentioned, by the electrical test—that is, Dr. Hanson applied the electricity; I did not.

Q. Did you make any application of strength by pulling or some such thing to determine whether the arm was normal or not?

A. I stated a bit ago the arm we lifted that to the height of the shoulder with resistance.

Q. What did the electrical test show?

A. Showed contractions of the muscles with the exception of a slight contraction of the muscles across the scapula, the contraction was not as perceptible as the other muscles' contraction, was slighter than the others, the contraction was.

Q. What examination did you make of the left hip?

A. We had the man lying on the table and we took measurements in regard to the length of the limb; found them exactly the same length. And we measured the limbs in circumference. We examined them and they were practically the same, I don't remember the measurements. Then we applied extension and flexed the limb.

Q. How? Show.



A. Brought the limb up to the body and then straightened the limb (indicating) without pain.

Q. Without pain?

A. Yes. Then we adducted and abducted the limb. That is, abducted, moving it away from the body, and adducted, moving it to the body.

Q. Both limbs?

241 A. The affected side.

Q. What was the result?

A. There was no pain. I don't remember of him complaining of any pain of the lower limbs at all. Then we used, or Dr. Hanson used, the stroke on the heel.

Q. How severe? Can you demonstrate?

A. Of course I don't know how severe it was. It was quite a rap.

Q. What was the result of that?

A. Without any complaint.

Q. Did you notice his walk at the time he came into the room or subsequently?

A. Yes, I did. I paid attention to him as he came into the waiting room, he was walking with a cane in the left hand, stepping with his right foot placing his cane with his right foot, as he came into the waiting room.

Q. What would be the result of that?

A. Favoring his right limb.

Q. And not the left?

A. Not the left.

Q. Have you noticed him since then, doctor, since that time, since he has been present here in court?

A. Yes. I know on one occasion that I noticed him walking the same way.

Q. Walking the same way?

A. Walking the same way.

Q. Did you find any permanent injury at all to the left hip or any injury?

A. No sir, we did not.

Q. Getting back to the arm: So far as the usefulness of the arm is concerned, is there any permanent impairment there?

A. Well, I don't know. I don't think there is. I don't think there is a permanent impairment. There is an impairment at the present time.

Q. Due to what?

A. I rather believe it is due to carrying the arm as he has all this time and not using it. I believe if the arm had proper treatment and proper exercise he would in time fill up the deltoid muscle so he would get better action of it. I don't say he would get complete action of it, but I believe he would get enough action there so he could go on and perform labor.

Q. As he did before?

A. I don't know to what extent he could labor.

Q. He was a laborer on the railroad on the bull dozer, and as engineer; would he be able to do that?

A. I don't know anything about that labor.

242 Q. Did you find any evidence of injury of the hip, external evidence of it?

A. No, I don't remember of any to the hip.

Q. Did you find any other injury to his body?

A. We found a scar on the buttock that——

Q. Describe that scar, doctor.

A. It extended down to the anus but it was a superficial scar. It didn't look——It looked like a scar that would be caused from a wound healing by granulation.

Q. What condition did you find in the anus? What did you determine that condition?

A. The anus looked normal. It was contracted down well and the muscular contractions around the anus were normal. In this test we took a sharp knife and would place it against the anus and watch the contraction, practically the same test we used on his shoulder. When we used this sharp instrument we would prick him with the knife and ask him if he felt it and he would say "no," but the muscle would contract just the same. Then when we moved around to another place and he would say "no" and it might be back to the same place and he would say "yes," and there was contractions of these tissues at all times. Then Dr. Hanson used the finger cot and made a digital examination; in other words inserted his finger into the rectum.

Q. The result of that?

A. At first he started in to introduce two fingers and the man complained.

Q. What did he say, that it hurt him?

A. Complained of its hurting him.

Q. From the examination you made there of the anus what did you conclude as to its condition?

A. I saw everything, the digital examination and everything that Dr. Hanson did and I noticed particularly when he introduced his finger into the rectum, the anus or sphincter muscle, the anus looked to me to be in a normal condition, otherwise than the scar, of course. What I mean by a normal condition was it would contract so and perform its functions normally.

Q. Did you apply the electrical currents to any other part of his body?

A. We used the electricity over the whole body. When we started on the arm we worked right down to the end of the arm and used it on the other side, first one side and then the other. We did that to determine this: to find out if the contractions of the muscles on each side were alike. That's what that was did for, comparing the side that he complained was injured with the normal side. And we got contractions of the muscles the same on both sides with the exception that when we tested the deltoid muscle and the

243 muscle over the scapula we didn't get contractions as strong as we did on the other side.

Q. Did you apply it to the anus to determine whether there was feeling there or not?

A. Yes, sir.

Q. Tell the jury about that.

A. I am not going to reiterate again.

Q. I didn't know whether you told that.

A. I told you we used the electricity over the whole body; tried first one side and then the other to see if they would correspond.

Q. What did you conclude then, from your entire examination, doctor?

A. We concluded from our entire examination that the man is suffering and that the suffering is in the shoulder over the scapula. And the other parts are in a normal condition.

Cross-examination, Dr. MASON.

By Mr. Gray:

Q. (Coming up close to the witness.) May I ask you to stand up just a moment, doctor?

A. (Witness stands up.)

Q. As I understood you said you raised his arm about like that (indicating) and that was as near as you could get it?

A. Yes.

Q. Why didn't you get it up?

A. Because he kept hollering pain and complaining.

Q. You only put it up to here, however?

A. That's all right—

Q. That convinced you, of course or at least that was evidence to you of course that there was something interfering with the raising of the arm, doctor?

A. I didn't say that there was anything there. He seemed to have some tenderness over the scapula and deltoid muscle and when we put the arm out like that there was tenderness, and when we raised it up he complained of pain, and resisted.

Q. That resistance might have been muscular movement in and about this shoulder joint?

A. I rather believe it was muscular.

Q. It might have been—

A. Yes, it was muscular.

Q. If it was only muscular why didn't you go on and raise it?

A. Because he complained.

Q. You quit then?

244 A. I will tell you why we quit. We had not seen any X-ray picture of his shoulder and did not know the exact condition of the shoulder, and when we raised it that far and he kept complaining why we quit until we should get an X-ray picture of his shoulder. I am satisfied in my own mind now that his arm could have been put higher than it was, then.

Q. Just answer the questions, doctor.

Mr. Korte: He has a right to explain.

The Court: Yes, your opinion, just answer the question.

Q. I understand you to say from your examination you believed that you could build up this deltoid muscle?

A. Yes, sir.

Q. But would not say he would get a complete recovery?

A. No, sir.

Q. Now this injury to the rectum: You could not tell how deep that wound had been from the scar, could you?

A. No, sir.

Witness excused.

Dr. A. I. BOUFFLEUR was called and being duly sworn as a witness on the part of the defendant testified as follows:

Direct examination.

By Mr. Korte:

Q. Give your name.

A. A. I. Bouffleur.

Q. How long have you been a physician and surgeon, doctor?

A. Twenty-nine years.

Q. And for the defendant railroad company?

A. Just about twenty-five years.

Q. What position?

A. First as assistant surgeon; later local surgeon and for the past fifteen years, chief surgeon.

Q. Of what school are you a graduate?

Mr. Gray: I will admit his qualifications.

Mr. Korte: I don't want you to do that. I want to show them, the same as you did Dr. Shepherd's.

The Court: You have a right to show his qualifications.

A. Rush Medical College.

Q. Give your experience with reference to surgery.

A. Following my graduation from Rush Medical College I interned in the Cook County Hospital in Chicago; after that for 21 years I was connected with the institution as attending surgeon and also as teacher of surgery; also I was connected with the Washington Boulevard Hospital, Chicago.

Q. During those years did you examine any patients with injuries due to violence?

A. Yes. I was experienced in that; gave a course in traumatic surgery for something like 18 years.

245 Q. Where?

A. At the Cook County Hospital in Chicago.

Q. When did you first meet Mr. Kinzel, the plaintiff in this case?

A. On or about the 30th of March, 1915, about six weeks after his injury.

Q. Where was that?

A. At my office in Seattle.

Q. What did he come there for?

A. He came there for the purpose of an examination which I was to make and report to him and to the claim agent of the railway company as to his condition and the outlook as results of his injury.

Q. What date was that? Did you say?

A. On or about the 30th of March, 1915.

Q. Did you make an examination of his person at that time?

A. I did.

Q. Tell the jury what you found in relation to the man being injured at that time.

Mr. Gray: I shall object to that. He was not attending him for the purpose of making a court examination. I shall not object to his giving the result of the examination later, made for court purposes.

Mr. Korte: I don't know what you mean. The doctor has a right to state any examination he made on request of the man himself, regardless of when it was and regardless of subsequent events.

The Court: Are you invoking the privilege?

Mr. Gray: Yes. I have no objection to the doctor testifying to his examination made for the court.

The Court: That is confidential relation between patient and surgeon, is the ground of your objection?

Q. Did you examine him for the purpose of treating him or advising him as to how to recover?

A. No, sir.

The Court: I don't think it calls for that objection. I overrule it.

Q. Go ahead and detail that examination.

Mr. Gray: Let me ask the doctor a few questions:

Cross-examination of Dr. BOUFFLEUR on the question of privilege.

By Mr. Gray:

Q. You are one of the physicians connected with the St. Mary's Hospital, are you not?

A. Yes. With St. Mary's Hospital Association?

246 Q. Yes.

A. Yes, sir.

Q. The hospital Mr. Kinzel went to?

A. Yes.

Q. You are chief surgeon of the Employees' Beneficial Association or Hospital Association of the Milwaukee?

A. Yes, sir.

Q. And as such you have the supervision over the treatment and care of the men who are injured in the employ of the railway?

A. And of the business affairs of the institution itself, yes sir. I am executive head of that institution, both of the business affairs and the medical affairs of it.

Q. These hospitals and the treatment of all these injured men are all under your general supervision?

A. Yes. They are generally for the district, men in various districts we have who — responsible for the care of them, but in a general way they are under my general supervision.

Q. Yes, sir. And these men contribute a certain amount per month to the association of which you are chief surgeon, for which they receive medical and hospital treatment, all those who are injured?

A. You mean the company also?

Q. Yes.

A. Yes, sir.

Q. Mr. Kinzel had been an employee of the railway and had been and was considered a member of the association?

A. That was my understanding.

Q. The hospital at St. Maries, that is not owned by the Association, I understand?

A. No, sir.

Q. You are interested in it, however?

A. Very slightly.

Q. Well, to some extent?

A. I hold one 250th interest in it, simply so I can be an officer; that's all the interest I have in it.

Mr. Gray: I think after that cross examination I shall object to his testifying under section 5958 of the Revised Codes of Idaho.

The Court: Read that, Mr. Gray.

Mr. Gray read the statute and in the course of his argument upon the objection said: I do not think it is right that this man should take the money of the employee and then should be permitted to testify against him concerning matters that came to his knowledge at that time, afterwards——

Mr. Korte: I object to the remark of counsel, "take money of the men" or words to that effect, as prejudicial before this jury.

247 The Court: I think it is unnecessary. I sustain the objection and ask the jury not to consider it.

(The question on the objection was argued by respective counsel.)

Q. Did you make your report to him and the claim agent, that is, to Mr. Kinzel, and the claim agent?

A. I told him the findings that I made as I went over his body; then I also made report to the claim agent as to my findings and thereon they made prognosis of what the outcome would be.

Q. Did you establish any course of treatment that you——

A. No, sir; he hadn't been a patient under our care for four weeks, at the time I saw him. I made no suggestions as to his treatment.

Mr. Gray: May I ask a question?

The Court: Yes.

Mr. Gray: Did you advise him what he should do, how he was to conduct himself?

A. I told him what I thought the effect would be if he did certain things in the way of exercise and use of the arm, that the trouble would gradually lessen.

Q. In other words, you gave him advice as to how he should conduct himself and how he could improve; is that it?

A. I told him what the result of these things would be if he would do them.

Q. Did you tell him what the result would be if he didn't do them?

A. I don't recollect that I did especially, but I told him that if he did certain things in the way of exercise and using the arm the trouble of which he was complaining might, and would gradually improve.

Examination resumed.

By Mr. Korte:

Q. And that was not for the purpose of treatment. You simply told him what you thought the result would be if he did those things?

A. Yes, sir. And I told him that I thought he would improve if he did those things.

Q. That was the sole purpose of this examination?

A. Absolutely.

Q. Simply examination to determine the extent of his injury so they would be able to determine from that whether he had a just demand or claim; that was the sole purpose of this examination?

A. Absolutely.

Q. Now, doctor, go ahead and tell what examination you made and what you found about his person with reference to the accident and his injury.

248 Mr. Korte: Now, I will take the Court's ruling.

Mr. Gray: I object to that.

The Court: I do not think the relation of physician and patient exists here. I shall overrule the objection.

Q. Go ahead and tell what you found upon your physical examination of the man.

A. I stripped the man's body and examined his shoulder and other parts of his body. He was carrying his arm in a sling at right angles, and directed my attention to the fact that he had had an injury to the shoulder. And in examining that I noticed that there was at that time, which was six weeks after the injury, that there was quite a bit of stiffness about the shoulder and also some discoloration of the arm and the hand and that he held the arm in a restricted position. And taking hold of the arm and moving it I was able to throw it out from his body a few inches at the elbow, I should say about eight inches at that time, but when I attempted to rotate the arm by putting his hand behind his suspender button he stated it pained him in the shoulder, so that this was not carried out to any great extent. There was a weight or sort of dropping down of the



parts of this whole arm and shoulder, but on examining its individual muscles and making him use the individual muscles in various movements, I was able to satisfy myself that there was an activity present in his various muscles. Of course at this time, only six weeks after, the parts were still tender and the examination was not carried to any forcible extent in any direction.

Q. What did he say about any use he had made of the arm for the time since he came out of the hospital?

A. He made no statement to me as to having used the arm up to that time.

Then I went over his back and directed his attention to various injuries, and examined the scar and found that was superficial; and that there was apparently no disturbance in the spine or in that region. I examined his bottom and I could see the scar running out from his rectal opening. The scar was superficial, and there was a space right in the middle of this scar about one inch long, I should say, and about a quarter of an inch wide which was not completely healed. He wore a cloth which I examined and it had very little soiling upon it, only just a little soiled; the opening of the rectum I examined and it showed the folds around it like the puckering string of a purse; that showed normal except where this part of the wound was not fully healed. There was very little evidence of soiling, and it was holding the faeces and controlling the bowel movement so I

made no internal examination of the bowel at that time.

249 No complaint was made to me at that time that any—of any difficulty with his hip.

Q. How did he come into the office? Walking or with or without aid?

A. He walked into the office without aid and no complaint was made to me at that time of any injuries to the hip. There had been contusions on various parts of the body, some which I was unable to locate and which he was unable to locate, anyway they were apparently superficial. He also informed me that there had been contusions, at this opening where there was a scar and that there had been other contusions on his body.

Q. Did you see him again? What became of Mr. Kinzel after the first examination?

A. After the examination that afternoon I took him across the street and had an X-ray picture taken of his shoulder; and I think that is the last that I saw of him, possibly I met him on the street a day or so afterwards. And then on the 26th of April I think it was, practically four weeks afterwards, he returned for another examination.

Q. In the same office you have described as the first one?

A. The same office.

Q. What did you do then?

A. I again stripped the upper part of his body and he showed me what he could do then with his arm and stated that since I had last examined him, he had been doing light work with his arm;

that he had chopped some wood with it. And upon his own volition, with my assistance, was able to put his hand on the opposite shoulder; also he was able to put his hand up to where his suspender button would be, which would be up to about the small of his back, and was able to raise his elbow to about 45 degrees, which is half way up to the level of his shoulder.

Q. Were his suspender bottoms in front or behind?

A. Behind. I fixed that by explaining that it was about the small of his back.

Q. Oh, I didn't notice that; go ahead.

A. There was a very noticeable improvement in the roundness of his shoulder and in the tonicity of the deltoid muscle. At the first examination there was a distinct limitation between this part of the shoulder blade which is called the acromion process and the head of the arm bone, or humerus. This showed a marked improvement, and so that he could bring his arm, himself voluntarily, up to 45 degrees and at that time I was able to raise his arm further, but he still complained of pain when it was put through extreme motions.

In answer to my inquiry in regard to the arm he stated he  
250 was able to move it through ordinary movements without pain but when we attempted the extreme motion in any direction, he said it pained him.

Q. Is that upward, forward, backward or how?

A. In any direction, as I remember. He made no complaint to me at that time about his rectum, and I did not examine that part of his body at that time.

Q. How did he come to the office with reference to walking or use of his legs?

A. As far as my recollection goes he walked in without any assistance at all. I know there was no complaint by him to me at either of these examinations of his inability to walk. On the second examination I have no recollection that I examined anything below his legs.

Q. That was all of that examination was it? Have you detailed now the entire examination?

A. I believe that is all. That is all I recollect at this examination.

Q. Did he complain about control of his bowels at either examination?

A. There was no complaint about difficulty with his bowels at either one of the examinations.

Q. When did you next see him?

A. I next saw him here at the time the previous trial was set. I believe it was in June last.

Q. I think it was some time in the fore part of June.

A. Yes. I am not certain whether I met him at any other time or not.

Q. You were present at that examination which was made of him by Dr. Hanson and Dr. Mason?

A. Yes, sir.

Q. Were you there during the entire examination?

A. Yes, sir.

Q. From when he came to when he went?

A. Yes, sir.

Q. Go on and state just what was done there and what you saw there with reference to that examination, when the man came in, how he came in, everything about it.

A. Well, he was in the waiting room, I believe, when I came in and after nearly an hour's wait Dr. Hanson came and asked him to come into the main room. He walked in with a cane in his left hand and he was extending the cane, putting it forward with his right foot.

Q. Show to the jury how he was walking with the cane.

A. He was walking with the cane so (indicating).

Q. Have you ever been required to use a cane in your lifetime?

A. Yes. I had to walk with a cane for six or eight months once.

251 Mr. Korte: Will you allow us to use your cane, Mr. Kinzel?

(Cane produced and given to witness who illustrates before the jury.)

A. There are two ways of walking with a cane. You throw your weight on which ever limb you want to, and you favor the limb you want to in this way. The way this man walked was to extend the cane with the right foot and in that way help to carry his body on the right foot at that time.

Q. Where would that throw the weight of his body?

A. That would divide the weight of his body between the right leg and the cane.

Q. What leg would that favor?

A. Favor the right leg.

Q. Not the left. All right. Now go on and tell what that examination disclosed.

A. He removed his clothes and the examination, in a general way, was conducted along the lines which have been testified to. The examination was made of his skin in various parts of his body by the use of a pin point and cotton and other means, to determine the sensation of his skin, and the sensation of his skin was shown to be what is called "erratic"; that is when the man would say he could not feel the pin point at one place, and on going to another place and after a while returning to that point he would say he could feel it. And there were some areas that he could not feel the pin point. There were three areas which he persisted in more or less and that was—his index finger, front finger on the right hand, he claimed the sensation was very poor in it and also about his rectal opening and on his left hip, over his left hip he said there was a part which he could not feel the pin prick and about the anus he could not feel the point of a

sharp knife. This examination was made by the use also of the electric current and it was shown that he could feel in the areas about the fingers very perceptibly and also——

Q. What did that indicate?

A. Very plainly that his sense of touch—that he could feel and would withdraw his finger in that test. And when the application was made to the rectal opening he said he couldn't feel it there, but every time we touched it the muscles would contract, which *should* that, notwithstanding his statements, he could feel it. On the electricity being applied at that point he emphatically stated he felt it. When the electric current was applied to the hip where he said he couldn't feel the pin point, he objected to that and said if we didn't stop that he would get off the table. That was at the same point which a few minutes before he had said he could not feel anything.

252 The tests were made of the shoulder and the range of motion was very decidedly less than on my previous examination.

For instance, he could only bring his arm out from his body about fifteen degrees, that would be the elbow about eight inches from the body, voluntarily. When I asked him to put his hand over on his opposite shoulder, as he had done previously, he would only bring it up by his right breast; would not get it across the median line. When I asked him to put it to the small of his back, as he had done before, he would only straighten his arm out; said he couldn't get it back at all. He claimed it was impossible for him to move his arm in any direction without causing him great pain. The electric current was applied and showed that each of these muscles had a reaction in them and the arm was brought from where he had voluntarily brought it to about eight inches from the body, contraction of this deltoid muscle.

Q. Go ahead and state what you found the condition of the arm was with reference to paralysis of the circumflex nerve.

A. I don't think the muscle was as large as the muscle on the opposite side. The belly of it was not as round. At the same time there was a distinct reaction from it, and on having him bring the arm up six or eight inches you could feel some muscular action with your fingers. When the electric current was applied you could feel the muscle contract distinctly.

Q. What did you conclude?

A. I concluded the use of the arm which he had been giving it during the interval between my previous examinations and during which he had improved, had made this marked improvement, had not been carried out.

Q. If there was paralysis of the circumflex nerve what condition would you have found?

A. If the circumflex nerve is paralyzed then a man can not pull his elbow out from his body. It is primarily its function to pull the arm this way (indicating), bring the arm across the body; and an important function too, is to raise the arm up from the body

until you get it up about level, and when you get it up that far the whole shoulder blade slides on the chest for more extended movement, it is limited then to about ninety degrees of movement, beyond that point movements are made by the shoulder blade sliding on the chest beneath.

Q. Could the arm be moved now with reference to the shoulder itself further than what he attempts to move it?

A. You mean move the whole shoulder?

Q. Yes.

A. I would say in answer to that from what I have seen of the man I should say the indications are here that the shoulder blade is not sliding on the chest.

Q. Have you detailed all you found there with reference to the arm and shoulder—How about the temperature of the arm?

253 A. The temperature of the arm and two hands seemed to be—It was practically normal.

Q. I think Dr. Marshall said that the circulation was bad; that when he would press on part of the skin that the skin would turn white and leave marks and be some time before it would return. Describe whether or not you found any such condition.

A. We found no condition of that kind at the time of the last examination. The first examination I made I found a condition, I might say which is always present in any injury to the shoulder, or any large joint for that matter, you are going to have interference with the circulation of the parts below, and it is liable to continue unless the man uses the limb.

Q. Did you find any such condition when you examined him?

A. I found the circulation on my two examinations was practically the same. The temperature was the same and the circulation was apparently the same.

Q. Did you examine the anus?

A. We did. That is, it was examined in my presence. I did not personally examine it.

Q. Did you see it done?

A. I did. I was squatting down there, he was on the table and Dr. Hanson was examining it. I was there with my face within 18 inches of it and he examined that; saw the operation, the test with the sharp knife and also the doctor introduced his finger. As he attempted to introduce the two fingers Mr. Kinzel objected on account of the great pain. When he introduced one finger, when he withdrew the finger, it closed down and there was no escape to excess of bowel content.

Q. How long was the examination at that time?

A. I should think the examination then was three quarters of an hour and then he had been in the waiting room, been there for possibly an hour or three quarters of an hour and then he had been in the waiting room, been there for possibly an hour or three quarters then.

Q. Had he had a passage in the meantime?

A. He had not.

Q. He had gone through all these tests you have described before the test of the doctor putting his finger in the anus?

A. I think most of the tests were made before that time.

Q. Were they easy or severe tests applied?

A. They were the usual tests where action is sought to be elicited without hurting the man. Of course they caused him pain but we tried not to cause him more pain than was actually necessary to determine the result. The current was no stronger than was actually necessary to get the facts, but if it was necessary to have a stronger current in order to get the facts it was done.

Q. What did you find at the anus?

254 A. We found a superficial scar but could find no inflammation or irritation at all.

Q. Did the scar interfere at all with the functions of the anus?

A. No. The scar at that time covered part of the anus. As I previously stated the anal muscle was in such condition it was able to contract so as to close the opening and perform its function. The scar tissue on the surface did not interfere with its functions.

Q. Did he have any cloth about the body?

A. When he took off his trousers he took off a bandage which he told me at first he had been wearing for four days, but later he said he had only been wearing it for two days. It had a slight soil on it, but a very slight one.

Q. Nothing out of the ordinary?

A. Nothing more than you frequently see on the underclothes or shirt tails of most people.

Q. Did you examine the hip?

A. Yes. He surprised me by the statement that he had trouble with his left hip. In the way he was walking I supposed it was his right hip. But in examining his hip we found that while he could bring his right knee well to his body when he was lying down, the right knee, right leg could bring it up here, when he brought the left one up only about fifteen degrees from the table he complained of pain in this hip, fifteen degrees is only about that much from the level (indicating). But later when he was sitting in the chair, he would necessarily have to bring it up to ninety degrees. We also had when examining the rectum and his anus, the manipulations at times were more than ninety degrees.

Q. Did he make any complaint?

A. No, not in these subsequent tests.

Q. What other tests did you make of the hip?

A. We rotated, turned the hip in and out, from a direct line with the body out from that line and towards it, and also compared it with the movements of the other leg. And the movements of it at that time were not restricted. When his attention was on it when we started to make this test he would not let us bring it up, but when his attention was diverted to something else it would be moved without any objection to it. The measurements were made and the two limbs were found to be equal.

Q. Do you recall Dr. Hanson making a test of the limb by striking the sole of the foot?



A. Yes, sir; I remember it.

Q. Describe the amount of the blow he brought in play in making that test.

255 A. He made a substantial blow on the sole of the foot, which of course would be hard to estimate, but a good, sharp chuck. I don't know, I never attempted to estimate the force of a blow of the sort and have no means of knowing how much force he did use.

Q. What complaint did he make when the foot was struck?

A. No complaint at all.

Q. What conclusion did you come to with reference to the condition of the hip?

A. From the examination we concluded that we found nothing the matter with his hip. From the fact he was using a cane and walking as he did, we concluded there was nothing the matter with his left hip.

Q. Did you find anything wrong with the right hip?

A. We did not.

Q. He made no complaint of the right hip?

A. None at all.

Q. Now, doctor, generally, from your various examinations that you have made of the man and what you have seen, and his present physical condition, tell this jury whether or not there is any permanent impairment of the man's ability to work if proper use is made of the arm?

A. No. It is my opinion if he continues the use and pursued the course he had been pursuing during the month of April, 1915, if he had continued that during the following two months, he would be able to continue his work. I gave my opinion then to him and to the railroad company about that, that was before any suit was started or thought of, or I knew there was to be any trouble at all. That was my opinion then and is now. He kept this arm inactive since May 1915 up to the present time; that is quite a long time and any limb that has been out of commission, unused, it will take time to bring it back, to get his muscles toned again, take a long time in order to take systematic steps to improve it.

Jury admonished, recess ten minutes.

#### After Recess.

Q. Did you make any memorandum of the measurements that were taken at the time of the last examination in your presence, doctor?

A. Yes, sir.

Mr. Gray: Did you make this memorandum yourself?

A. Yes, sir; I made that myself in my own handwriting which is very difficult for any body else but myself to read.

Q. What were they?

A. These measurements are identical with Dr. Hanson's and show the two limbs and arms were practically the same size, the two limbs are exactly the same length.



256 Q. Did you notice the plaintiff, Mr. Kinzel, walking since the beginning of this trial, since you came here at this trial? Tell the jury how he walks now with the cane at this time.

A. Can I borrow your cane again, Mr. Kinzel?

(Cane produced and witness illustrates before the jury.) Most of the time he walks with the cane along with his left leg this way (indicating) with the left one. Occasionally he switches and walks with it in this way, steps with the right one and then goes back to the left one again. But he walks with the left one all the time when I saw him, before, but this time he walks part of the time with the help of the left one and part of the time helping the right, in this way (indicating).

Q. Will you step down here and explain to the jury, that is, rather, these various X-ray plates. Take first plaintiff's Exhibit B, being the X-ray of plaintiff's shoulder. Explain what that plate shows.

(Plaintiff's Exhibit B was placed in the X-ray box before the jury.)

A. This plate gives a picture of the socket of the shoulder and the bone crossing the body upwards and inward direction. This line—upward and inward direction from the mid line of the body. This shows the head of the bone in this cavity here, and also being separated from this acromion process, the bone of the shoulder, this little bone right on the point of the shoulder. There is a little shadow projecting from the bone at this point, a little shadow opposite the point where the large bone here is on the opposite side and below the shoulder joint.

Q. Where does that show if at all, any excrescence?

A. That is just what I have mentioned, that shadow there, that might be interpreted to be that.

Q. State whether or not that will interfere with the movement of the man's arm.

A. The movement of the arm in this position (indicating), hanging down, this enlargement would be between the head of the bone and the shoulder blade. Of course if the shoulder was raised up this way, it would be raised away from this projection or excrescence and not pushed towards it; therefore, this prominence would not interfere mechanically with the raising of the arm up to the point where it comes in contact with this bone at the point of the shoulder.

Q. What is there between the shoulder blade and the circumflex nerve?

A. The shoulder blade which is five by five by seven, has a muscle running from its inside across over here, being fastened to the head of the arm bone, which is shown on the plate and the circumflex nerves are on the other side of the muscle from the bone; in

257 other words, the muscle is between the nerve and the bone.

Q. Does that plate show any permanent impairment of the power to use it? Does that plate show anything in it that interferes with the power of use?

A. No, there is nothing on the plate that shows any interference or would show there was any interference or anything on the plate that shows that interference would be mechanically possible, and there's nothing shown there that would mechanically interfere with the use at all.

Q. Take defendant's X-ray plate of the hip, being defendant's Exhibit No. 8, and explain that plate to the jury.

A. This is the large hip bone commonly called the thigh bone, the outline of the socket and the head of the bone are within the limits and in my opinion is normal. The part that has been testified to as a projection here from the bone——

Q. Run your pencil around that, doctor, so the jury can see it.

A. At that point marked "X" there is a projection on the top of the hip that is shown rather prominently in this particular place, but some of them are very much more prominent, it is a condition present in normal hips; some where the projections are longer than this and others that have the projections of less prominence, but this is within the limits of normal. The markings across the neck of the bone are within the limits of normal as shown by the examination of bones which have not been injured.

Q. Does the plate show any fracture of the hip joint or any interference there?

A. I could not find anything that suggests that.

Q. It has been testified by the plaintiff, doctor, that there was an impacted fracture there; Doctor Marshall so testified that there was.

A. Well, the thigh bone has a neck going off diagonally and if when you take the picture the foot was turned a little further out, or if taken straight, it makes a little different line in your picture. This part here, if it is tipped upward or inward would be shorter and this shortened line would be shown. If taken further in, you would look at it in this line and this line would be thrown in; and if held perfectly straight then the line would be about midway; and so the location of that line depends entirely upon the normal condition of the rotation of the foot. If the foot is allowed to be flat you have one result; if in the middle, another and if turned in you have still a third. That is not indicative of an impacted fracture.

Q. If there was an impacted fracture of the man's hip could he have stood on his feet?

258 A. No.

Q. Explain why.

A. An impacted fracture means where the neck of the bone is driven into itself. There has been, undoubtedly instances where a man has been able to walk a few blocks in such a condition, but it is impossible for one to stand walking on an impacted neck of the femur continuously for the reason that a fracture in healing must throw out soft bone first. Hard bone cannot grow together. Hard bone has to be soft at first; like a flesh wound has to be covered with granulation tissue, so a bone has to be covered with granulation tissue, soft bone. So it would be hard for a person with an impacted fracture, it would be difficult to walk two blocks; I have heard of a woman who walked six blocks, then this gave way. This bone will give way

if they walk continuously. It is true that an impacted fractured femur cannot maintain the weight of the body continuously every day.

Q. Take the two plates of Dr. Hanson and explain them. Take the first plate of the normal condition of the hip shown in defendant's Exhibit No. 9.

A. This picture shows the same overhanging lip as is shown on the other one and also shows the same general lines across the neck of the thigh bone.

Q. Now show the other one to the jury once more, defendant's Exhibit No. 10, explain that plate to the jury? Show the jury that plate.

A. This plate has a more pronounced lipping than the Kinzel plate, while the rim of the socket is not so pointed in here, there is a distinct little projection about a quarter of an inch wide and apparently sticking out about a quarter of an inch. This is not uncommon at all. It is not uncommon at all to find this condition, this lipping in various joints of the body.

Q. Now compare Dr. Shepherd's X-ray plate and show where it shows similarity.

A. This is Kinzel's plate with the lipping projecting down in that manner, and this is the other plate with the lipping projecting in the same manner, and being more pointed than the one shown above.

Q. Does the plate of Mr. Kinzel show any fracture of the shoulder joint?

A. I am unable to make out any condition there that shows a fracture.

Cross-examination, Dr. BOUFFLEUR.

By Mr. Gray:

Q. Let's get exactly your connection with the Milwaukee Railroad.

259 A. Chief surgeon.

Q. As chief surgeon you have charge of this Employees' Association have you not? What do you call it?

A. Two separate positions in a way. I am chief surgeon of the Milwaukee Road and also chief surgeon of the Milwaukee Hospital Association.

Q. That association includes the employees of that company from Seattle to the east?

A. It included most of them, not all of them.

Q. They contribute monthly dues?

A. Yes, sir, and there are certain benefits in accordance with the rules under the direction of a board consisting of employees and officers of the company.

Q. You are the executive head of it?

A. The executive head, yes sir.

Q. In addition to that you have other hospitals, have you?

A. This association has hospitals and also I am interested in other concerns that have hospitals.

Q. It is part of your duties to keep track of the injuries to employees of the railroad company?

A. No, I don't keep any track of individual injuries.

Q. No, but if there is any trouble that they can't settle you look after the company's medical interests in these cases don't you?

A. No, on the contrary I examine very few patients. Once in a great while—I say once in a great while, I might see half a dozen cases this month and might not see another for three or four months. If I happen to be in the office and they want my opinion they bring the patient up to me and I examine him and make my report.

Q. You testify in every case?

A. No. On the contrary, I rarely testify. This is the third time I have been on the stand in over two years—I think it is only the second time.

Q. That is, for the company?

A. Yes, sir. I think this is only the second time.

Q. Now, doctor, you said something about the sensation of Mr. Kinzel being erratic?

A. Yes, sir.

Q. What conclusion did you draw from what you call an erratic sensation?

A. It is supposed to be where the answer is not correct, intentionally misleading.

Q. Intentionally misleading?

A. Yes, sir.

Q. You desire to give it as your opinion that this man was intentionally misleading?

260 A. As far as sensation of his rectum, I say so most emphatically.

Q. You spoke about a place on his arm where the sensation was erratic?

A. Yes, sir.

Q. Do you desire to be understood by the jury as saying that he was intentionally misleading in his statement?

A. I would not say he was intentionally misleading in all those areas generally, but it was my opinion he was in these particular areas.

Q. I want your opinion whether you desire the jury to understand that it is your opinion that he was intentionally misleading. Was it?

A. I think in some parts I think he was intentionally misleading in some of his answers. In regard to testifying you ought to allow me to explain myself in justice to you as well as to yourself.

Q. Never mind me, doctor.

A. When we tested these areas with the pin or sharp point, the doctor using it might press a little bit deeper at one particular point than others, and he would say he didn't feel it, and perhaps going to some other point come back to that and he would answer that he did feel it. Some points he would answer correctly, others his answers were misleading, and from the fact that when testing in some area he would answer one way and coming back later apparently with

the same test would answer differently, you would be inclined to be led to that conclusion that he was intentionally misleading. As far as the anus is concerned there were evidences there that showed conclusively that he was desiring to mislead us, because he said he couldn't feel it at all and every time it was touched that sphincter would shut down, showing what is called reflex action. And the man must feel it in order to have a reflex action.

Q. You stated sensation over areas as large as the palm of your hand were erratic?

A. Yes, sir.

Q. At one time he would tell you he was feeling it and another time he was not?

A. Yes, sir.

Q. It is your desire to be understood as saying from your examination of the plaintiff that his answers so far as these sensations were concerned, in his answers he was misleading?

A. It would be my inference from the fact that there was an attempt to mislead us in regard to the sensitiveness of his skin over some individual areas, so that I would say that, as to those individual areas. But I would not say and I don't mean to say as to

261 the whole examination as to his answers about his sensation, that his answers were unreliable.

Q. On his arm, I mean.

A. Yes, sir, on his arm I think they were.

Q. In other words he was faking his injuries?

A. If you want to say it that way.

Q. I want the jury to understand.

A. I think they understand my other answer.

Mr. Korte: I object to that.

Sustained.

Q. Were the muscular contractions in the injured arm as noticeable as in the other arm? Yes or no, if you please.

A. In my opinion I would say no, not as noticeable; that is, that there was a lower reaction, not quite as prompt or as strong.

Q. With the galvanic battery as a testing method, you could see a difference in the reaction, could you not?

A. Yes, in the promptness of it, and with the hand on the muscle you could feel the action underneath.

Q. And the jury could see it could they not?

Mr. Korte: This is argumentative, Your Honor.

The Court: Objection sustained.

Q. You say that they were not as—

A. Not as prompt and I don't think the muscle tone—for instance, of the muscles—the tone of the muscles of the right arm, which he has not been using, is as good as the tone of the muscles of his left arm which he has been using.

Q. In other words, the contraction of the right arm was more sluggish?

A. Might not be so prompt or so forceful.

Q. May I use the word "sluggish"?

A. Well, it is slower.

Q. At the time you used the galvanic battery it was so was it not?

A. I think it was a shade.

Q. It was such a "shade" that the ordinary eye could observe?

A. I don't know as the ordinary eye could see it. That was my impression. Others might have got a different impression.

Mr. Gray: I think one other did.

Mr. Korte: What's the idea of the remark "One other did"?

I object to the remark of counsel.

The Court: I think the remark is objectionable.

Q. You say disuse of the arm when in a splint or is not used, tends to interfere with good circulation?

A. Yes, and good nutrition, good tone of the parts.

Q. In other words, if it is not used it interferes somewhat with the circulation?

262 A. Yes, sir.

Q. How do you account, if this man has not used his arm as much as he could, for the circulation being the same in both hands?

A. As I say, when he came to me they were apparently alike when I felt of them, the difference was so slight when the man came to me, to the touch, and examination and so forth, that the two felt the same, which is a common experience.

Q. If that condition is the result of disuse how do you account to the jury for the circulation being the same at that time?

A. I didn't say the circulation was not disturbed; it might have been at my former examination, but it was disturbed in so slight a measure that I thought it was practically the same.

Q. You desire the jury to understand that it is your opinion that the only reason his arm is in the condition it now is, is from disuse?

A. You are using a very general expression when you say "arm in the condition it is" from disuse.

Q. You said that there was some interference at least, or that the muscles of the arm had been somewhat atrophied or wasted, didn't you?

A. Yes.

Q. From what cause do you think that atrophy or wasting came?

A. I judge from the result of my previous two examinations, and his use of the arm in the interval between the two examinations, I inferred it was due to the fact that there was a lack of usage of these muscles, because he had been making such progress during those four weeks that if he kept it up I saw no reason why it should not continue.

Q. Suppose he had kept it up as well as he could, the same exercise and use that he did for the period intervening between your first and second examinations then what would you say was the cause of the condition which you found there in June of this year?



A. I don't think it is supposable. I thought that at the time myself.

Q. I am asking you to assume that, and give your answer without getting your testimony as to whether it is true or not. If it be true that he continued to use the hand and arm and muscles as much as he could, would you say then there would be this atrophy and wasting—to what would you then attribute this atrophy and wasting?

A. Well, Mr. Gray, to say that "as much as he could" that is such a liberal term I cannot base a definite professional opinion on such a statement.

263 Q. If he had followed the same course of exercise and use of the arm that he did in the interval between the 30th of March and the 26th of April, 1915, if he had continued that, what would you say that the condition that you found in June, 1916, was caused by?

A. I would say it had not recovered, had not regained the full tone.

Q. It was not in as good condition when you saw him in June, as when you saw him in the latter part of April, 1915?

A. No, I don't think it was quite as good. I don't think it responded quite as good. As far as movement, he did not move his arm near as freely as he did at that time.

Q. What is the reaction of degeneration?

A. That is a condition of the muscles with which I am not particularly familiar.

Q. What is degeneration?

A. That is where the muscle cells degenerate, where the chemical substance breaks up and forms other substance in the muscle cell.

Q. Is it not true that if there be an injury to the muscle injury to the nerve supply, the nerve supplying muscle, and at the end of two years the atrophy continues and the apparent degeneration continues to increase, the probabilities are that there will be no recovery?

A. Well, you are using the term "apparent degeneration." I don't know what you are talking about.

Q. In case that degeneration is present and after two years still continues, there will be no recovery?

A. I will say I am not very well versed in that and do not pretend to express an expert opinion upon that subject.

Mr. Korte: It is not proper cross-examination.

Q. Would you know how to determine whether a muscle will regenerate except by electrical reaction?

A. Will regenerate?

Q. Yes.

A. Well, I think this: If a nerve is off and you repair that nerve that muscle will probably regenerate; can't say definitely. I have had such cases regenerate and I have had them fail, so I would say it can probably regenerate.



Q. Is there any method of determining by examination other than electrically, whether it will regenerate?

A. Not definitely, perhaps.

Q. What is that electrical test?

A. I have done that test years ago but, as I said before in regard to the other question, I do not consider myself qualified to speak upon that subject. As I said, I did that test years ago,  
264 but I was not interested with reference to that question and did not pursue it and I do not consider myself qualified to speak upon the subject of muscular regeneration.

Q. Is it not a fact that the purpose of making this electrical test was to determine whether there was an injury to the muscle or the nerve supplying the muscle?

A. The test as I understand it—

Q. Answer that yes or no.

A. (Question read.) No. I think the purpose of the test was to determine whether the muscle was active.

Q. Suppose the nerve was destroyed, would there have been any reaction in the muscle?

A. Not ordinary reaction. There might have been, under this test, some technical response but not the ordinary contraction such as have been reported and such as we found in this case.

Q. If the nerve was not injured and the muscle was injured would there be the reaction?

A. What reaction?

Q. Could you find reaction in the muscle if the muscle itself had been injured directly?

A. If the nerve was still intact, that part of the muscle to which it was still connected would contract.

Q. Let us now get to the injury of the hip, doctor,—or first, the shoulder joint. That shadow that is shown, that light substance that is shown between the shoulder socket you said and, what bone did you say?

A. I said there was one that might indicate a little excrecence, or callous, a little outgrowth of bony substance.

Q. You observed that?

A. Yes, that shows a little shadow of that sort.

Q. That, of course, would be bone or it would not show?

A. It has some lime salts in it, yes.

Q. What effect does such a bony outgrowth have upon the ligaments about the joint?

A. If it is near the ligament it would have a tendency to prevent the stretching, but being below the ligament as indicated, I don't see that it would have any effect upon the ligament, or have anything to do with the ligament, or limit its action, and if it is below it would not.

Q. Now does the presence of that on the plate indicate to you that there had been a fracture in that joint?

A. No, not in the joint.

Q. You do not think the fracture extended into the joint?

A. No. I have seen plates that showed very definitely that it was not in the joint.

Q. Are they in evidence?

A. No, sir.

265 Mr. Gray: Then I suggest his answer be stricken.

Mr. Korte: Have you got them here?

A. The second plate was the one that is in evidence, shows that the fracture is outside of the joint.

Q. And does not extend to the joint?

A. That was my interpretation of it, yes.

Q. You wish to be so understood?

A. I do.

Q. Now speaking of an impacted fracture of the hip. That will heal if the patient is kept in bed?

A. Yes, sir.

Q. How long will he have to be kept in bed?

A. Well, that depends somewhat upon the individual, but where union takes place in from six to eight weeks, sometimes it occurs, where they hold the parts together in much less time, but they usually run about six or eight weeks.

Redirect examination, Dr. BOUFFLEUR.

By Mr. Korte:

Q. You were asked about the Milwaukee Hospital Association. Is that an association for the purpose of profit?

A. It is not. It is organized as a purely benevolent, beneficial association organized by the employees of the railway company and operated without profit to the railway company or to anyone else.

Q. Who are the contributors of it?

A. The contributors are operating employees, men who are in the operating service, in the operating department of the Puget Sound Line of the Milwaukee system. The contributors are these men.

Q. Is the railroad a contributor?

A. The railroad is a contributor, yes sir.

Witness excused.

Mr. Korte: I offer in evidence now a blue print showing the location of Ewan and Bridges 140 and 142, which I ask to be marked for identification Defendant's Exhibit No. 13.

Mr. Gray: I object to it as immaterial.

The Court: It will be admitted.

WILLIAM KINZELL, the plaintiff, was recalled for cross-examination.

By Mr. Korte:

Q. Is that a photograph of your person that I am now showing you?

A. I can't tell. I can't tell who that is.

Q. Is it you or not? Just say yes or no, and I will be satisfied.

266 A. The man that is taken there, I can't tell who it is.

Q. Does it look like you?

A. I can't tell anything about it. It is taken from the back.

Mr. Gray: Let me see it. I have a right to see it.

Mr. Korte: He has not identified it. I have not offered it. It is not before the court. If he had identified it, I would.

Witness excused.

Mr. Korte: At this time defendant offers in evidence the models here of the bulldozer and of the Western Air Dump car, and ask that the model of the bulldozer be marked for identification Defendant's Exhibit No. 14 and the model of the car Defendant's Exhibit No. 15.

The Court: They will be received in evidence.

Mr. Korte: We rest.

Thereupon the plaintiff produced the following in rebuttal.

WILLIAM KINZELL, the plaintiff, was recalled and testified as follows in rebuttal on direct examination.

By Mr. Gray:

Q. Prior to the happening of the accident did you take your foot or otherwise, or touch or open the knuckle on the dozer?

A. No sir, I did not.

Mr. Korte: I don't think it is rebuttal. He described where he was and what he was doing at the time.

The Court: I think it is proper to contradict testimony on that point, when it is in the record.

Q. Could that knuckle be opened by the foot from the car?

A. No sir, it could not under any consideration.

Q. How was it operated?

A. Why you would have to get down here with one hand and pull this lever up here, and then with the other hand you would have to pull that knuckle open before it would be open.

Q. Did you see that man, Mr. McGraw, there any place?

A. No sir, he was not there.

Q. Did you discharge Mr. McGraw at any time?

A. I did, yes sir.

Mr. Korte: I object to that as not rebuttal; collateral issue brought out on cross-examination. We would have a right to again try that issue by our witnesses as to whether he was there or not.

The Court: I think it is not proper rebuttal.

Mr. Gray: Question of interest. He denied interest in that respect, feeling towards this witness.

The Court: He showed very strongly that he had feeling against Kinzell while upon the witness stand.

Mr. Korte: I think Your Honor's remark is very prejudicial, and want to except to it, with all deference to the Court.

267 Q. What did Dr. Bouffleur tell you with reference to the use of your arm?

A. He told me there was nothing the matter with it, that I just imagined that it was injured.

Q. What did he tell you to do?

A. He told me to try to use it all I could.

Q. That was the first time you went to see him in March?

A. Yes, sir.

Q. What did you do then?

A. Well, sir, I was around the house, around the car trying to do everything in my will power to regain the strength. And I got some water a little distance from our car, and to keep busy with my left hand, in my left hand I had a five pound lard pail full of water.

Q. You carried that water up to your car from where?

A. From the spring. I just got our drinking water.

Q. And you would try to do such work?

A. Yes, sir.

Q. You heard the section boss' wife testify about you holding your hands up while your wife was pinning up blankets or something of that kind?

A. Any time after I was injured?

Q. Yes, sir.

A. No, sir, I did not.

Q. Were you able to do that?

A. I should say not.

Q. Do you remember the handsomely dressed young lady who appeared upon the witness stand?

A. Yes sir, I do.

Mr. Korte: I object to the remark as not proper examination. I think counsel should be told what is proper if he don't know.

The Court: Oh, he knows. The objection is sustained.

Q. The young lady, the assistant postmistress. Do you remember at any time going in there and holding up both hands or your right hand to get your mail?

A. No, I never did.

Q. Could you do that at any time after you were injured?

A. No sir, I never could.

Q. Or get your hand up to write? Can you write with that hand?

A. Yes, sir, I can.

Q. Or raising it up, could you raise it above your shoulder to the desk?

A. No sir, I never could, never did since I was injured.

Q. How about yawning? Have you at any time since your injury ever yawned and stretched your arms up?

268 A. Have I done like this (indicating with one arm up)?

Q. Yes. Stretched your right hand up, stretched with your right arm up?

A. No, sir.

Q. State what the fact is about your having exercised and used your arm, whether you have—whether you continued to exercise and use of your arm that — had previously to calling on Dr. Bouffleur?

A. He told me there was nothing the matter with it; that I just imagined.

Q. Tell the jury what the fact is as to your continuing to use it the same way you did between the two visits.

A. He told me to use it; told me that there was nothing the matter with it. I used it just as much as I could. I tried to use it every way I could use it.

Q. How long did you keep trying?

A. I have tried it ever since I have been injured.

Q. To the present time?

A. Yes, sir.

Q. Did you say anything to Dr. Bouffleur on either of those occasions about the trouble you had with your bowel movement?

A. Yes sir, I did.

Q. On which occasion?

A. Why, on both.

Q. Did you tell him about your hip on either of those occasions?

A. I did, yes sir.

Q. Which one?

A. My left hip.

Q. On which occasion?

A. Why, on all of them.

Q. Both occasions?

A. Yes, sir.

Q. Did he make an examination of it at that time?

A. No sir, he did not.

Q. Did he make an examination of it on either of those occasions?

A. No sir, not at Seattle.

Q. Did he of your rectum?

A. No sir, he did not.

Q. Mr. Kinzel, one other question I want to ask you: Have you used a cane at all times since your injury?

A. Why no sir, I didn't at all times.

Q. When did you start in?

A. Why I don't just remember. I had a stick first, I used that for a while and then I got me a cane after the accident.

269 Cross-examination; WILLIAM KINZEL.

By Mr. Korte:

Q. Did you tell your attorneys about the condition of your hip when you went to them?

A. Did I tell them?

Q. Yes.

A. Yes, sir.

Q. Did you read your complaint over when you signed it and swore to it?

A. Yes sir, I did.

Q. Did you call their attention to the allegations in there in relation to your hip at that time?

A. I never called nobody's attention that I know of; I just looked it over.

Q. Mr. Kinzel, is it not a fact that when you use the coupler on a work train where the coupler is used continuously in the rain, snow, shine, and in the work train service, that knuckle will not open entirely, and you have to open the knuckle by hand?

A. It will not move from behind, and you have got to open it with your hand. You can't make anybody believe you can throw that knuckle out.

Q. I didn't ask you this; answer the question.

A. Ask it again.

Q. Is it not a fact that where the coupler is used such as the one in question was used on the dozer in connection with the work train service hauling dirt in the rain and all kinds of weather in which the dirt accumulates upon the coupler, upon the lever and the trip by which you release the knuckle—you know what the knuckle is?

A. Yes, sir.

Q. You do not use the lever to throw the knuckle out, but you have to use your hand to throw it out?

A. It will not couple onto the dozer.

Q. Why?

A. Because it would not come out. You got to pull it out, you got to haul this up like that, you got to pull it out.

Q. That is the pin you lift out, then you make the coupling?

A. You got to pull that pin out before you can pull the knuckle out.

Q. What kind of a coupler was that; what's the name of it?

A. It was just like that (indicating the model).

Q. What is the name of it?

A. I don't know.

Q. Was it the Tower?

A. I don't know.

270 Q. You have got to hold that up, you say?

A. Yes sir, you got to hold that up.

Q. According to that then, it would take one man at the pin lifter and one in here in order to operate the coupler?

A. No sir, it would not, he could do it here like that (indicating).

Q. You would have to go in between the cars to detach that coupler?

A. Yes sir, you would.

Mr. Gray: Did they have any hook on the air hose on the train or on the dozer?

A. No sir, they never did.

Witness excused.

HYRUM S. LEE was recalled in rebuttal and testified as follows.

Direct examination.

By Mr. Gray:

Q. You saw this man McGraw on the stand yesterday? You saw him there?

A. I have seen him here.

Mr. Korte: You mean Mr. McGraw:

Q. Was he about these cars or near the place of accident at the time it occurred?

Mr. Korte: I object to that as not rebuttal; leading and suggestive; part of their main case. They proved who was there and what was there.

Overruled.

A. No, he was not.

Q. Was he near the place here where the two cars came together when they coupled? (Indicating on the model.)

A. No sir, he was not.

Q. Did you see him any place about there?

A. I did not.

Q. Had he been there would you have seen him?

Mr. Korte: I object to that as a conclusion.

The Court: The objection to that question is sustained.

Q. After the accident, when Mr. Kinzel was lying there by the side of the track, did you see McGraw there?

A. I did not.

Q. Was he there?

A. No, I don't think he was.



Cross-examination, HYRUM S. LEE.

By Mr. Korte:

Q. You don't think he was?

A. No.

Q. Did you see any man go by that dozer that morning when you were about to couple up?

271 A. No sir, I did not.

Mr. Gray: You mean at the time of this accident?

Mr. Korte: Yes.

Q. You did not?

A. No, sir.

Q. You did not see any man passing along there?

A. No sir, I did not.

Q. Of course you were not looking when the train started to couple onto the dozer, that is, you were not looking towards the east were you?

A. When they coupled?

Q. Yes.

A. I was looking as near towards it as I could.

Q. Towards the train. Had you been looking in that direction before they coupled up, how long?

A. Not but a mighty little.

Mr. Korte: That's what I thought. That's all,——

Q. On which side of the dozer did you jump, facing to the right hand or the left hand?

A. Well, suppose this was east (indicating on the model).

Q. Yes, which side did you jump off?

A. I jumped off the left hand side when I jumped.

Mr. Gray: On which side was Kinzel picked up?

A. He was on the left hand side of the train, that is, facing east.

Witness excused.

Mrs. KINZEL was called in rebuttal and testified as follows:

Direct examination.

By Mr. Gray:

Q. Did your husband at any time after his injury help you pin up some blankets or take up some blankets or hold them up?

A. No sir, he did not.

Q. Was he able to do that with his right arm?

A. No sir.

Mr. Korte: I object to that as incompetent; witness is not qualified to say whether he was able to do it or not.

Mr. Gray: As well as some of these doctors.

The Court: The objection is sustained.

Q. Did your husband work at chores and use his hand?

A. He carried a lard pail half full of water.

Q. Did he do what he could in the way of exercising the hand?

A. Yes sir, what he could.

Q. How long did he continue using the hand as much as he could?

A. Why he always did.

Witness excused.

272 Dr. J. H. SHEPHERD was called in rebuttal and testified as follows:

Direct examination.

By Mr. Gray:

Q. With this galvanic battery will you show the jury the reaction upon Mr. Kinzel's two arms?

Mr. Korte: I object to it as not proper rebuttal; went all over that on direct examination; of the physical examination he made with the tests and everything.

The Court: I shall permit it. But of course in giving them permission to reopen their case I give you the privilege of reopening your case also.

Mr. Korte: Our case is closed. Of course I want to make the record that I object to any demonstration at this time along the line of the question.

The Court: I shall overrule your objection.

Mr. Gray: Can we not go over to Dr. Hanson's office?

Mr. Korte: No. I object to holding this lawsuit anywhere else but in the courtroom where it belongs.

It was found that they could not arrange the apparatus and the jury was duly admonished and excused until 9:30 o'clock tomorrow morning, and court adjourned until 9 o'clock tomorrow morning.

Friday, November 3d, 1916—9 a. m.

At this day, present as before, the following proceedings were had in absence of the jury:

Mr. Korte: I can state my motion now and it can be considered as made at the close of the testimony.

The Court: Yes.

Mr. Korte: Defendant moves the court to direct a verdict in favor of the defendant on the following grounds:

1. There is no evidence in the case which will justify the jury in finding that the defendant was guilty of negligence;

2. The evidence is clear and without dispute that the plaintiff was in plain sight of the train which was moving toward him to make the coupling and whatever was its speed he was either aware thereof or by the use of his senses could have known and apprehended the same and avoided the risk of injury; on account of all of which he assumed the risk of the injury which befell him;

3. Plaintiff has of record elected to recover in this action solely under the Act of Congress of April 22nd, 1908, and the acts amendatory thereof and supplemental thereto, commonly referred to as the Federal Employers' Liability Act; he has failed to prove a  
273 cause of action within said Act in that there is no competent proof that the plaintiff at the instant of time of the injury was employed by the defendant in interstate commerce or was performing any service in interstate commerce.

Mr. Korte: In addition to that I want to make the following motion:

Defendant moves the Court to withdraw from the consideration of the jury the issue relative to the failure of the defendant to have upon the dirt train in question an appliance called a tail air hose, upon the ground that there is no evidence that this was the customary equipment for the well-regulated operating purposes, that it was not customary to have such equipment attached to any part of work trains or dirt trains operating under the conditions and circumstances which the evidence shows these railroad trains were being handled and operated at the time plaintiff received his injuries.

(Counsel for plaintiff argued the motion and pending his argument the jury came in at 9:30.)

Mr. Korte: Let the record show that by agreement the work in which plaintiff was engaged at the time of the accident was wholly within the state of Washington and the work trains were moving back and forth across these bridges and the bridges were wholly within the state of Washington.

Mr. Gray: And will you agree that Ewan and LaVista and the two bridges were wholly within the state of Washington?

Mr. Korte: Yes; I was asking to make that proof in the record that the work trains were moving wholly within the state of Washington. I shall ask to make that proof for the record.

At 9:30 o'clock a. m., Friday, November 3d, A. D. 1916, the jury came in and the following proceedings were had in presence of the jury:

The record of yesterday's proceedings was read and approved, and, present as before, the jury all being present, the trial of this cause proceeded as follows:

*Plaintiff's Case Reopened.*

Dr. JOHN H. SHEPHERD was recalled as a witness for the plaintiff and testified as follows, the plaintiff's case having been, by order of Court reopened.

Direct examination.

By Mr. Gray:

Q. Have you brought to court and arranged here a galvanic battery?

A. Yes. I have not tested it out, but I presume it is working.

Q. Very well, will you make these tests upon Mr. Kinzel, showing the reaction from the battery of his right and left arms and explain as you do so to the jury.

A. I shall have to have Dr. Hanson to show me about this machine that I am not familiar with.

274 (Dr. Hanson and Dr. Shepherd fixed up the battery.)

Mr. Korte: In connection with the other concession of Mr. Gray, it is admitted that the work train and the dozer on the day and at the time the plaintiff was injured were moving and being operated wholly within the state of Washington. Mr. Gray told me to dictate that into the record.

The upper part of plaintiff's body was uncovered and the tests proceeded in the presence of the jury.

The Witness: I am now applying the peratic, the continuous flow current that produces continuous reaction of the muscle, while the current is being applied. I am applying it to the left shoulder which is the uninjured shoulder, and reduce the amount of the current so as to have sufficient current to produce contraction of the uninjured side.

Mr. Korte: I object to this. The application was to be to the injured parts and was to be galvanic at that.

Mr. Gray: No, it was to be on the two sides.

Mr. Korte: Besides it seems to me there was to be no evidence introduced except the galvanic test, and he is not making that test at this time.

Mr. Gray: Well, he will make the galvanic test.

Mr. Korte: Very will, then.

The Witness: Now under this current you notice the contraction of muscle fibre. Turn around sidewise, Mr. Kinzel, so the jury can see.

Mr. Korte: I object to any statement of the doctor's. It was to be simply a view by the jury, as I understand it.

The Court: You can give a description of what you are doing, doctor, but not the effect.

Q. What are you using?

A. I am using six volts, with the induction coil out to point two.

Q. You are now applying it where?

A. I am now applying it to the injured side.

Mr. Korte: Shows that muscle moving. Let the jury step around in front.

Mr. Gray: Let him go ahead.

Mr. Korte: I think the jury ought to see the parts of the arm as to whether the muscle is twitching or not.

The Court: Let the jury see it all.

The Witness: I am now reducing the current.

Q. What muscle are you applying it to?

A. To the deltoid muscle of the uninjured arm. I have now reduced the voltage to four volts and the induction coil to one and a half.

Q. Did you use that on the deltoid?

275 A. I used that on the deltoid. I am now applying it to the deltoid on the uninjured side or to the left side. I am now applying it to the deltoid on the right side. I will now reduce the voltage to two and a half volts and reduce the secondary to point 1.

Q. You are applying it now to which side?

A. I am now applying it to the left side. I am now applying it to the right side, the deltoid muscle on that side.

Q. This here, does that make any difference?

A. It increases the current slightly on account of the resistance from the moist pad. I will now apply the galvanic current.

(The doctor spends a long time getting the galvanic current in order.)

The Witness: I never worked one of these machines.

Q. State what you are doing, doctor.

A. I am now applying the galvanic cathode to the deltoid muscle on the left side. There is something wrong with the current. It is not running satisfactorily at all. I can just barely feel it.

Q. What are you doing now, doctor?

A. I am now applying the galvanic cathode to the deltoid muscle on the left side and the current is now turned off. I throw the current in. I now throw the current out. I now throw the current in. I now throw out the current. The current is now thrown in. I now apply it to the right side. I now throw the current out, and I now throw it in. I now throw it out and I now throw it in; I now throw it out.

Q. This is the galvanic current is it, doctor?

A. This is the galvanic current. And if Your Honor please, I

would like to say that I cannot measure the amount of current the way the machine is working here today.

The Court: Very well.

The Witness: That is all.

The Court: Now let Dr. Hanson demonstrate.

Witness excused.

*Case for Defendant Reopened.*

Dr. LEONARD E. HANSON was recalled and testified as follows:

The Court: You can proceed to make the tests, doctor, that you want to.

Thereupon the doctor proceeded to arrange the batteries and make the test. Dr. Bouffleur takes hold of the moist pad.

Mr. Gray: I would like to have a juror hold the pad. There can be no objection to a juror holding the pad.

Mr. Korte: No.

276 Thereupon a juror takes hold of the moist pad.

Mr. Gray: As you apply it, state what you do, on what side you apply it.

A. I want to get the proper current first.

Mr. Gray: What voltage are you using, doctor?

A. Four mille amperes.

Mr. Gray: What voltage, doctor?

A. I am getting the same voltage that Dr. Shepherd did. I have 32 volts, 65 galvanic, and 4 mille amperes, that is it is not reading correctly, that's about what it is.

Mr. Gray: Measure the current if you can, accurately doctor.

A. No, it is not registering correctly, but I can get a pretty good idea of the amperage which is shown. I am now applying four mille amperes to the muscle on the affected side.

Mr. Gray: Galvanic current, doctor?

A. Yes.

Q. What was that last voltage?

A. That was on point 2 peratic.

Q. What is that, what voltage current?

A. The voltage it was 32. It is not registering anything now.

Mr. Gray: Will you let Mr. Kinzel turn around and let the jury look at his arm where he has been applying that.

Mr. Korte: I ask that the doctor be not interrupted in his demonstration.

Mr. Gray: I think I have a right to ask that the plaintiff turn around so the jury can see where this has been applied. Turn around so the jury can see, Mr. Kinzel.

(Plaintiff does so.)

Mr. Korte: At the same time turn around and let the jury see it applied on the other shoulder.

Mr. Gray: What are you applying now, doctor?

Mr. Korte: Let him make his demonstration.

Mr. Gray: I have a right to know what he is doing.

Mr. Korte: You can ask him how much voltage he is using, how much the record is. I can do that myself if I have a chance.

Mr. Korte:

Q. Now, doctor, you can state what voltage and amperes you are using for the record. Please give the record, doctor.

Mr. Gray: I ask that the question be answered.

Mr. Korte asked you what voltage and amperage you were using.

A. I was trying to get some line on the voltage. The register gives 40 volts and 65 galvanic, but the mille amperes don't register anything. The mille ammeter showing there was no current coming through a few minutes ago. I will now apply the electrode to the affected side.

277 Mr. Gray: Will you apply it alternately on each shoulder?

Mr. Korte: It seems to me he ought not to be interrupted by this gibberish of counsel, walking back and forth and putting in here for the benefit of the jury. I object to it.

A. I am now applying it to the arm on the side that is not affected. I am now applying it to the right arm.

Mr. Gray: Will you just say what voltage that was, doctor?

A. Fifty volts. Am I supposed to use the same amperage as when I tested him before?

Mr. Korte: Yes; use any that you wish. You are not through, doctor?

A. I am through if I am to use the same amperage I used before.

Mr. Korte: It seems to me he is entitled to use anything that will get the reaction business there.

The Court: Are you through with Mr. Kinzel?

Mr. Gray: I am going to have Dr. Shepherd make one.

The Court: Well, you'd better get through as soon as you can and let the plaintiff cover himself.

Mr. Korte: Doctor Hanson has not completed his experiment; we are waiting for Mr. Kinzel to come back. He has gone out temporarily. He is not yet sure of the amount of voltage he used when he examined him and I would like to have the plaintiff—

The Court: He can have it. Let the doctor conclude his examination. Come forward Mr. Kinzel, if you have rested sufficiently. I thought you were through.

(Mr. Kinzel comes back and Dr. Hanson proceeds with further demonstration.)



Mr. Gray: May I make the inquiry, doctor, what you are using now?

A. I am now using twenty mille amperes output.

Mr. Gray: How many volts?

A. Fifty volts and 8 galvanic. I am now applying the electrode over the deltoid muscle on the affected side with twenty mille amperes.

(By Mr. Korte:)

Q. What muscle are you putting it on now doctor?

A. The deltoid.

Mr. Gray: What muscle is that now, doctor?

A. The deltoid.

Mr. Korte: Name the current.

A. Twenty mille amperes coming out of the point of the electrode.

Mr. Gray: Do you object to putting it on the other arm?

Mr. Korte: I object to interference with this demonstration by counsel.

278 Mr. Gray: I simply asked him to put it on the other arm.

Mr. Korte: Let him do it where he pleases.

A. I am putting it on the other arm, this way (indicating). I will now use the galvano-peratic.

Mr. Korte:

Q. What do you call that you have just used?

A. Galvanic.

By Mr. Korte:

Q. What are you using now?

A. The galvano-peratic.

Q. Where are you now placing the instrument?

A. On the affected shoulder.

Q. Whereabouts on the affected shoulder? Tell it as you go along, where you place it each time.

A. I am covering the whole deltoid muscle at this time. I now apply it around the shoulder over the area that is supposed to be paralyzed. You see the muscle fibre I am touching in this arm.

Mr. Korte: Give it quite a shock, doctor.

Mr. Gray: He has been doing that right along. Apply it to the other arm.

Mr. Korte: Now let him alone. I insist that the doctor be let alone by counsel.

Mr. Gray: There is no comparison with the two demonstrations at all.

Mr. Korte: Well he has a right to make his demonstration.

Mr. Gray: Where are you applying it now?

Mr. Korte: State where you are applying it.

A. Elbow and part of the upper arm.

Mr. Korte: Whereabouts, outside or inside?

A. On the outside. I am now applying it to the deltoid muscle. I will now apply it to the left arm.

Mr. Korte: That will be enough, doctor.

Mr. Gray: Before Mr. Kinzel dresses we want the jury to see this arm.

Mr. Korte: The jury has seen it and we object to it because they saw it in plaintiff's own examination.

The Court: The objection is overruled.

Mr. Korte: Turn your back also, and show this place from the back.

A. (Plaintiff is before the jury and shows them his arm and back.)

Witness excused.

279

*Case for Plaintiff.*

Thereupon Dr. JOHN H. SHEPHERD, a witness for plaintiff, resumed the stand.

*Examination.*

By Mr. Gray:

Q. You saw the experiments before the jury made upon Mr. Kinzel by Dr. Hanson?

A. I did.

Q. Will you describe the experiment made before the jury by you and state what that showed.

Mr. Korte: I object to that as not rebuttal. The demonstration has been made before the jury and the case was reopened for the purpose of the experiment and nothing else.

The Court: The objection is overruled.

Mr. Korte: I object to the form of the question.

Mr. Gray: Let it be understood that we reopened our case by permission of the court.

A. Upon examining Mr. Kinzel the first current which I used was the peratic current.

Q. Explain that term.

A. In order to understand thoroughly I will have to explain it. In order to test out the life or vitality of the muscles, and the conductivity of a nerve this battery, the transmission of amperes through the nerves, we start with the peratic current which is a continuous flowing current, in this respect that as long as the peratic current is applied it will cause a continuous contraction of the muscles. We use that just weak enough to produce a contraction of the muscle

fibres in the muscle which we wish to test. If a very heavy current is used it does the same thing to the body; if it does anything else it will jump the man. You can isolate the weak current and place it just where you want it, that is why a very weak current is used. We then compare the current that has just sufficient strength to produce contraction in a healthy muscle, then apply the same current to the supposedly affected area to determine whether the reaction occurs in the affected area, as it does in this case. The galvanic current only produces contraction of the muscle at the opening and closing of the circuit. In other words, as long as the galvanic current is constantly flowing there is no spasm or contraction of the muscle but upon the opening and closing of the circuit depending upon the strength of the current and the conductivity of the nerve and the muscle we will or will not get contraction. Now under normal condition we will get a contraction of the muscle with the least current when the negative pole is applied over the nerve and when the current is closed with the least possible current in a healthy muscle will produce that condition. It requires less current to produce contraction when the negative pole is over the metal point and the current is opened, that is under normal conditions. Now unless we have an instrument that will register accurately the amount of current that we are using and we can tell how much more current is being required to produce a contraction of the muscle at the opening of the negative pole's stimulation than it does at the closing; consequently by the test that was made here today it is impossible to show you—

Mr. Korte: I object to that as incompetent. The test was here before the Court and jury. I object to it as immaterial and irrelevant.

The Court: The objection is overruled.

A. It is impossible to show the diagnostic reaction known as the reaction of degeneration, and all that can be shown and all that was shown was the comparative contractivity of the muscles of the two sides. When a weak current is used the application of the current could be made to the individual muscles and produce the contraction of those muscles. If you use a very high current that will burn, the current jumps through from muscle to muscle and you get a group muscle spasm which of course means nothing in trying to test an individual muscle.

Q. Doctor, what have you to say concerning the current used by Dr. Hanson in his experiments as to the current—as to its effect upon the muscle whether it is paralyzed or otherwise?

Mr. Korte: I make the same objection to that.

The Court: Objection overruled.

A. Personally I never use as heavy a current, for the reason that in all electrical reaction we try to test the individual muscle and when the strong current is used you get a group muscle spasm and you can tell absolutely nothing about the individual muscle you

are testing. And, on account of the extreme pain that it causes the patient, I do not use it.

Q. If the muscles were to be removed from the body and a very strong current applied would there be reaction?

A. There certainly would.

Q. Was the current that Dr. Hanson used a very strong current?

A. It was unusually strong. It was the strongest current I have ever seen used either in diagnostic or treatment work.

Q. What were these muscles that contracted about the chest?

A. Those were the pectoral muscles, anterior and posterior and rhomboid muscles.

Q. What were the muscles in the arm?

A. The group spasm was the brachialis (anticus), the biceps, or supinator muscles.

Q. From the tests made before the jury this morning what have you to say about the deltoid muscle of the right arm of this man?

281 A. That the deltoid muscle is in an advanced stage of irreparable degeneration.

Q. Doctor, would an injury to the deltoid muscle prevent the arm being raised either by some other individual or by himself?

A. It would.

Mr. Korte: The doctor has explained that before.

The Court: I sustain the objection.

Q. Now about the rectum. Will you show Mr. Kinzel's condition to the jury?

Mr. Korte: I want to object to this for the purpose of protecting my record.

The Court: The objection will be overruled and exception noted.

Mr. Korte: This is to be a joint matter as I understand?

Mr. Gray: Yes. Dr. Hanson can assist or make the experiment.

The Court: Yes. Dr. Hanson and Dr. Shepherd represent each side.

(Plaintiff comes up and removes the clothing from the lower part of his person and is placed upon his hands and knees upon the table in view of the jury.)

The Witness: Gentlemen, this is a rubber glove which I always use in these operations, which I now lubricate.

Q. Doctor, describe what you are doing.

A. I am now inserting three fingers into the rectum. Here is where the scar was, gentlemen, comes around here and runs over here.

Mr. Korte: I object to any statement.

Q. Have you got another glove, doctor?

A. Yes.

Q. Will you let one of the jurors have it and try that if he wants to?

Mr. Korte: I object to that.

The Court: I shall not call upon any juror to do anything of the kind.

Mr. Gray: Do you want to make any experiment, Dr. Hanson?

Dr. Hanson: No.

Mr. Korte: I want the doctor to testify why he does not care to.

The Court: The doctor can make his explanation why he does not care to.

Dr. Hanson: I saw the fingers inserted in the rectum and it is no use for me to do it also.

Mr. Korte: I want the doctor to explain why three fingers now can be inserted but could not be when he examined him. But I don't want to interfere with your testimony. Our doctors will go on afterwards, I take it, to show why. I simply don't want to  
282 interfere with their testimony, your Honor. I want to make the record connected.

The Court: You will have opportunity to put on your doctors.

(Dr. Shepherd returns to the witness chair.)

Q. Is the anus or rectum in the same condition it has been in any examination you made?

A. Just the same as it was in the examination I made Sunday, but it is more relaxed now and on Sunday than it was on my first examination in May, 1915.

Q. How is it with reference to the condition when you saw him in May of this year?

A. I can see no difference.

Q. How about these X-ray plates: Did you see those two plates that were produced here by Dr. Hanson, one of a man by the name of Sanford and one by the name of Downey?

A. I did.

Q. Are they normal?

A. They are not.

Q. Explain why.

A. The one of Sanford, the plate shows a line where there has been a chipping and a lipping in the socket over the hip or shoulder. It is not a normal socket.

Q. Just put defendant's Exhibit No. 10 in the machine and show it to the jury and explain it.

A. (Putting Exhibit No. 10 in the X-ray box.) This is not only abnormal—there is not only an abnormal condition in this hip on the outer side or acetabular side as shown by the lipping above the hip bone on the femur, but it also shows that there is—that there has been an injury on the inner, anterior acetabular side; there is also an abnormal shadow on the lower margin of the acetabular cavity.

Q. Can you see that shadow extending from this lipping over in the bone?

A. There is.

Q. What does that indicate?

A. It may mean one of two things: Either there has been a fracture or an injury and that is an outgrowth deposit of lime salts.

Q. Have you another normal plate?

A. I have.

Mr. Korte: I object to it as not rebuttal.

The Court: I shall hold you to the physical examination in reopening your case.

Mr. Gray: Well, I think it is rebuttal. They come in here with a plate and say it is a normal plate. We certainly have the right to show it is an abnormal plate, when they claim it to be normal.

283 The Court: I think he can explain these plates that are put in evidence as a matter of rebuttal. I shall sustain the objection.

Q. Now about the other one, what have you to say of the Downey plate?

A. There's a lippling on the acetabular cavity in the Downey such as we find in old rheumatics, in patients who have had an injury to the hip, with later outgrowth.

Q. Is this a normal hip, doctor?

A. It is not a normal hip.

Witness excused.

Mr. Gray: That is all. But I want to make sure that all of these exhibits are in evidence.

The Court: Yes. The court will order that all exhibits which have been commented upon as evidence before the jury will be admitted as evidence.

Mr. Gray: We rest.

*Case for Defendant on Reopening.*

Thereupon the defendant to sustain the issues upon its part on the reopening of the case, produced the following:

Dr. LEONARD E. HANSON, a witness for defendant, was recalled and testified as follows:

Direct examination.

By Dr. Korte:

Q. Explain to the jury now the experiments which you made upon the plaintiff's body with the battery that you used, and all the various features of it and the results obtained.

A. That current was applied to the muscles, to the various muscles over the shoulder and the arm and showed contraction of the muscles, a weak current as I explained yesterday—

Q. When was the weak current used?

A. The first current which was given Mr. Kinzel today was a very weak current, which we use frequently in examining a normal

person who never had any injury. In the first place there is something wrong there with the intake, or something else causing a defect in the measurement of the voltage of the galvanic current; does not register properly. The amperage or the number of amperes you get at the point of the electrode is what counts. It does not make any difference how much voltage you have, but the amperage, the result in the end of the electrode is what counts. Four mille amperes at first, the contraction sometimes you can see, sometimes you can feel and sometimes neither one, the current not high enough to give you the reaction in the whole muscular system, the higher current high enough to give you the reaction in the whole muscular system

284 of the arm is the one by which you can get the best determination of the power with which the muscle fibres contract.

Q. In treatment, doctor, how heavy a current do you use?

A. Why I frequently give 100 mille amperes in paralysis treatment, sometimes more.

Q. In testing here, did you give a heavy current, for instance like you did here, did you give a current as heavy?

A. The weaker current did not show up contractions in either arm. The contractions which Mr. Kinzel had came on after the point of the electrode was attached and we increased the current sufficiently so the muscles would contract, which they did on both sides and every part of the deltoid muscles, the muscles in the right shoulder contracted and every part of the muscles of the whole arm and the shoulder showed reaction on the right side.

Q. Now from the experiments made with this man this morning, tell the jury whether or not this man has an arm that is totally impaired and can not be used in the future to do work with.

A. Why I have not changed my mind on that. I believe that with treatment followed by use of the arm, the arm will come out in pretty good shape.

Q. Now in regard to the anus, explain the difference now in relation to its condition and when you examined him June 5th, 1916.

A. No comparison at all.

Q. Explain it.

A. In June the sphincter muscle was very tight. There was no soiling of the buttocks. He had his cloth or napkin which he said had been on for two days, and he was in the office, I believe, about two hours and thirty minutes and there was no soiling. One finger was introduced into the rectum with difficulty, and no soil matter which was present on the buttocks today. There has been dilatation of the opening of the rectum; it is relaxed today.

Q. To what is that due?

A. Well, it is probably due to stretching.

Q. What would stretch it?

A. Several things would stretch it?

A. Tell us what would do it.

A. Stretching with the fingers or a dilator or speculum.



Q. Tell the jury whether or not they do stretch the anus in performing operations on that part of the body.

A. It is frequently stretched. It is always done in that kind of work. They prepare for the operation by stretching this muscle and tighten the bowels with an astringent.

Q. From the examination or what you saw of the anus this morning tell the jury whether or not it will return to the condition in which you found it when you examined him in June, 1916, in time.

A. Well, I don't know of any reason why it should not. I don't think he has had any more serious injury since that time or disease.

Q. In these experiments this morning did you find any anæsthesia or paralysis over the deltoid, of the skin?

A. I got reaction wherever I placed the electrode; that shows he has no paralysis of the skin over the deltoid.

Q. Of the skin over the deltoid?

A. Yes. And it hurt him.

Q. Doctor, you notice on the patient there were red places where the application of the current was made. Explain that redness to the jury.

A. It was the burning of the skin by the electrode with the galvanic current. The galvanic current will inflame the skin.

Q. On what part of the body did he have these spots?

A. He had spots practically everywhere the application was made. He had more on the right shoulder because more work was done on the right shoulder.

Cross-examination, Dr HANSON.

By Mr. Gray:

Q. After these experiments, doctor, before the jury this morning do you still desire to be understood as saying that the reaction of these muscles is the same?

A. No, they are not the same.

Mr. Korte: I object to this as incompetent and not proper cross-examination.

The Court: I think his answer was responsive to that question.

Mr. Gray: I ask that the reporter turn to the record of his cross examination yesterday.

Mr. Korte: Do you want that done now? It will take a long time to find that, your Honor.

Mr. Gray: You seem to object to it.

Mr. Korte: No. But I am tired out.

The Witness: I did not finish my answer to that question.

Q. Go ahead.

A. There is some difference in the contraction of the muscles of the two shoulders. The severe contraction of the left shoulder don't

mean anything because most of it was put on. But there was a slight difference in the muscular contraction of the two shoulders. In other words, there was a little less in the right shoulder than in the left.

286 Mr. Gray: Mr. Reporter, will you kindly find that record sometime yesterday where he said the reaction of the deltoid muscle was the same in both arms?

(The reporter finds the place in the record of the cross examination of the witness yesterday, and read as follows:

The Reporter (reading): "Q. Were the reactions different in the different arms? A. They were not. Q. They were just the same? A. Yes, sir."

Q. Did you so answer yesterday?

A. Yes, I did.

Q. Now, you said, you spoke of the voltage as being immaterial in these tests?

A. No, I didn't say that.

Mr. Gray: Mr. Reporter will you please get his testimony again today after we started in on this, and see if he did not say the voltage was immaterial.

A. I said the voltage was immaterial where the output at the point of the electrode is the object. I am not an expert in electricity at all.

Q. I don't care whether you are an expert, but from the standpoint of a physician, what is a volt?

A. From the standpoint of a physician a volt is a certain amount of current measured out for use by the apparatus in the office.

Q. What is an ampere?

A. The ampere is the product, is what you get, while the volt is what goes in, the ampere is what you get.

Q. The volt is what comes in and the ampere is what you get?

A. Exactly.

Q. One is what goes in and the other is what comes out?

A. You are supposed to get amperes coming out; I don't know.

Q. There must be some direct relation between voltage and amperes is there not?

A. Certainly there is.

Q. Explain that.

A. I can explain this best by this apparatus. If the voltage gives twenty volts, the rheostat five, there would come out at the part where applied about twenty mille amperes of galvanic current; that would be what you would get.

Q. Speaking of amperes, is an ampere and a milli ampere the same? Is a milli ampere part of an ampere?

A. Yes, sir.

Q. The fact is that that represents current from the battery and has no relation to the other at all?

A. You couldn't get amperes without volts. You have got to have electricity to get amperes.

287 A. A certain number of volts will give a certain number of amperes; is that the idea as you understand it?

A. With some other things considered.

Q. Several other things. But it comes into the machine in volts and comes out as amperes; is that the idea?

A. Yes, that's my idea of it.

Witness excused.

Dr. TRACY R. MASON, a witness for the defendant, was recalled and testified as follows on

Direct examination.

By Mr. Korte:

Q. This morning you saw the experiment by Dr. Shepherd inserting three fingers into this man's anus. Will you kindly explain to the jury the difference between the condition of the man's anus when you examined him in June and now, and the reasons for it.

A. When the man was examined in June by the physicians the anus was in an entirely different condition. There was contraction there. The sphincter muscle was in a normal condition. At the present time it is not in a normal condition.

Q. Can you explain to the jury its present condition and by what force it could occur?

A. The sphincter muscle has been dilated.

Q. How could that be done?

A. It is done several ways. It can be done with the fingers. It is not hard to dilate the sphincter muscle. Pressure applied on the sphincter for a certain length of time would cause it to relax, it can be dilated slightly or dilated to full extent. With violent dilation there is danger of breaking the sphincter, but it is a muscle that relaxes very readily and yields to pressure. It can be done by the use of a speculum or with the fingers or the two thumbs; can be done by introducing the two thumbs; that will dilate the sphincter so they can operate for hemorrhoids. It is not uncommon at all to dilate the sphincter to inject medicine or remove hemorrhoids. I do that right along in my office, dilate it to introduce medicine and the patient walks out of the office.

Q. To what extent would he dilate it with reference to whether he could insert the fingers, one, two or three?

A. He would dilate it sufficiently for hemorrhoids so they could put three fingers in there.

Witness excused.

288 OSCAR B. MOODY, a witness for defendant, was recalled and testified as follows:

Direct examination.

By Mr. Korte:

Q. What kind of a coupler was there on the bull dozer at the time Mr. Kinzel was hurt?

Mr. Gray: I object to that as not proper rebuttal.

Overruled.

A. It was a Munyon Coupler.

Q. Tell the jury whether or not that coupler could be operated with a man on top of the car by adjusting the knuckle, and if so, show the jury how you would do it.

A. Yes sir, it could be operated by a man on the top of the car.

Q. Show the jury how it could be done.

A. A man would step forward, raise this here and kick this open with his foot (indicating with the model).

Q. Is that the way you saw Mr. Kinzel do?

A. I saw Mr. Kinzel come right along here and do that.

Mr. Gray: I object to that as not surrebuttal.

Objection sustained.

Witness excused.

Mr. Korte: That's our case.

Defendant rests.

Thereupon the plaintiff presented the following in

*Sur-surrebuttal.*

WILLIAM KINZELL, the plaintiff, was recalled and testified as follows on examination:

By Mr. Gray:

Q. Has anyone, have you or has any other person dilated your anus?

A. No, sir.

Q. Have they done it at any time since June of this year?

A. No, sir.

Q. Have they had their fingers up there?

A. No, sir.

Q. Have you ever put your fingers in there?

A. No, sir.

Q. Has there ever been a speculum introduced there?

A. No, sir.

Q. Has anyone, except the doctors?

A. Only once with my examination.

Q. Have you had any operation for hemorrhoids or anything of that kind?

A. No, sir.

289 Q. The condition which you are now in today is the same as you complained of at first when you were injured?

A. It is.

Mr. Korte: That's a conclusion.

Q. Have you seen Mr. McKay here in court during the trial?

A. Yes sir, I did.

Witness excused.

Mr. Gray: We rest.

Thereupon the jury was duly admonished by the Court as required by law and excused until 1.30 p. m. today to which hour court took recess.

Friday, November 3d, A. D. 1916—1.30 o'clock p. m.

At this time, present as before the jury all being present, the following proceedings were had herein, to wit:

The Court: You desire to be heard further on this question, Mr. Korte?

Mr. Korte: If your Honor desires to hear me.

The Court: I will excuse the jury.

Thereupon the jury was duly admonished and excused, and the following proceedings were had in absence of the jury:

Mr. Korte continued his argument on the motion made this morning on the question of whether the plaintiff was engaged in work in interstate commerce; Mr. Gray following Mr. Korte in reply to his argument.

The Court: I am going to overrule the motion.

Mr. Korte: Now in relation to the first motion.

The Court: The taking consideration of the tail air hose from the jury?

Mr. Korte: Yes.

The Court: I am going to deny that motion. There is a conflict of evidence and enough I think to go to the jury.

Mr. Korte: Then the record will show that it is overruled and exception taken?

The Court: Yes. Overruled and excepted to and exception allowed.

Mr. Korte: And it will be understood that the record can show that these motions were made after all the evidence was closed?

The Court: Oh, yes. That can be understood and let the record show.

Mr. Gray: Yes.

At 2.35 p. m. the jury came in and all being present, the court proceeded to instruct the jury in writing.

290 Thereupon Mr. Gray proceeded with his argument to the jury on the part of the plaintiff followed by Mr. Korte for the defendant and at 5.30 o'clock p. m. the court took recess until 7.30 o'clock p. m., the jury being duly admonished and excused in charge of sworn officers of the court.

Friday, November 3d, A. D. 1916—7.30 o'clock p. m.

At this time, present as before, the jury being all present Mr. Wayne proceeded with his closing argument to the jury on the part of the plaintiff.

And at 8:30 o'clock p. m. the jury having heard the evidence received the instructions of the court and heard the arguments of respective counsel, retired in charge of sworn officers of the court to consider of their verdict, the court having instructed them to bring in a sealed verdict at ten o'clock tomorrow morning. And court adjourned until that time.

Saturday, November 4th, A. D. 1916.

#### Morning Session.

At this time, Mr. Wayne being present representing the plaintiff otherwise present as before, the jury came into court with the verdict and being duly called all answered and the following proceedings were had herein to wit:

The Court: Gentlemen, have you agreed upon your verdict?

The Foreman: We have.

(Sealed verdict passed to the Court.)

The Court: Gentlemen, listen to your verdict, as the Court orders it to be recorded.

Thereupon the clerk read the verdict, which was signed by nine jurors.

The interrogatories submitted to the jury were also returned, answered, with the verdict.

Thereupon the jury was excused from further consideration of this case.

Mr. Korte: If your Honor please I would like a stay of proceedings for the defendant for sixty days, by agreement with Mr. Wayne.

The Court: You will be granted a stay of execution, by agreement, a stay of execution is ordered for 60 days.

STATE OF IDAHO,

*County of Shoshone, ss:*

This certifies that the foregoing, complete in 384 pages is a full, true and correct transcript of my shorthand notes taken at

the trial of the case of William Kinzel, plaintiff vs. Chicago, Milwaukee & St. Paul Railway Company, a corporation, defendant, being cause No. 3768 in the above entitled court, trial commenced Monday, October 30, 1916.

Signed and dated this 29th day of December, A. D. 1916.

A. C. LIBBY,  
*Court Reporter of the First Judicial  
District of the State of Idaho.*

Reporter's Transcript lodged Jan. 5th, 1917.

L. R. ADAMS,  
*Clerk District Court,*  
By C. J. CALLAHAN, *Deputy.*

Service of the within Reporter's Transcript accepted, and the receipt of a true and correct copy thereof acknowledged, at Wallace, Idaho, this 5 day of January, A. D. 1917.

JOHN P. GRAY,  
WM. D. KEETON,  
W. F. McNAUGHTON,  
*Attorneys for Plaintiff.*

Reporter's Transcript filed after settlement.  
Feb. 8, 1917.

L. R. ADAMS,  
*Clerk District Court,*  
By C. J. CALLAHAN, *Deputy.*

#### *Order Settling Reporter's Transcript.*

The Reporter's Transcript in the case of William Kinzell vs. Chicago, Milwaukee & St. Paul Railway Company, a corporation, having this day been submitted, upon the application of Robert H. Elder, one of the attorneys for defendant and appellant, to the undersigned Judge of the District Court of the First Judicial District of the State of Idaho, in and for the County of Shoshone,—the Judge who tried the aforesaid cause,—for settlement, as provided by Section 4434 of the Revised Codes of the State of Idaho, as amended, and it appearing to said Judge that no designations of error or omissions in said transcript have been served and filed by either party herein within the time allowed by law, or at all,—

Now, therefore, the said Reporter's Transcript, as certified by the Official Court Reporter of this Court, is by me signed, settled and allowed as of and for a full, true and correct record of the proceedings had at the trial of the above-named cause, and the same shall be deemed adequate to present for review any ruling appearing therein to have been excepted to, or by the statute deemed excepted to, or any question of insufficiency of the evidence to sustain the verdict



292 herein which may hereafter be raised upon the appeal of said cause to the Supreme Court of the State of Idaho.

Dated at Wallace, Idaho, this 7th day of February, 1917.

WILLIAM W. WOODS,

*Judge of Said District Court.*

*Certificate to Complete Transcript.*

STATE OF IDAHO,

*County of Shoshone, ss:*

I, L. R. Adams, Clerk of the District Court of the First Judicial District of the State of Idaho, in and for the County of Shoshone, do hereby certify that pages one to 139, inclusive, of the foregoing Transcript on Appeal include all the papers prepared by me in the case of William Kinzell vs. Chicago, Milwaukee & St. Paul Railway Company, a corporation, pursuant to two præcipes therefor filed by appellant, Chicago, Milwaukee & St. Paul Railway Company, a corporation, one on the 31st day of January, 1917, and the other on the 15th day of February, 1917; that pages 142 to 525, inclusive, is the Reporter's Transcript, together with the order of the Judge who tried the cause settling said Reporter's Transcript, and that the foregoing Transcript on Appeal, complete in two volumes, was compiled and bound under my direction as a true and correct transcript of the proceedings therein contained.

In Witness Whereof, I have hereunto set my hand and affixed the seal of said District Court at my office in the City of Wallace, Shoshone County, Idaho, this 3rd day of March, A. D. 1917.

[SEAL.]

L. R. ADAMS,

*Clerk District Court.*

Service of the complete Transcript on Appeal, in two volumes, in the case of William Kinzell, Plaintiff and Respondent vs. Chicago, Milwaukee & St. Paul Railway Company, a corporation, Defendant and Appellant, is hereby accepted and the receipt of a full, true and correct copy thereof acknowledged at —, Idaho, this 16th day of March, A. D. 1917.

WM. D. KEETON,

*St. Maries, Idaho;*

JOHN P. GRAY,

*Cœur d'Alene, Idaho;*

W. F. McNAUGHTON,

*Cœur d'Alene, Idaho;*

JAS. A. WAYNE,

*Wallace, Idaho,*

*Attorneys for Plaintiff and Respondent.*

(*Journal Entry.*)

Boise, Idaho, February 11, 1918.

293 SUPREME COURT,  
*State of Idaho, ss:*

Court met pursuant to adjournment. Present: Hon. Alfred Budge, Chief Justice; Hon. William M. Morgan, Justice; Hon. John C. Rice, Justice, and the officers of the court, when the following proceedings were had, to wit:

No. 3035.

WILLIAM KINZELL, Respondent,

vs.

CHICAGO, MILWAUKEE & ST. PAUL RAILWAY COMPANY, a Corporation, Appellant.

This cause having been heretofore set for hearing, now on this day the same was called, Geo. W. Korte and Robert H. Elder appearing at attorneys for appellant and James A. Wayne appearing for respondent. After argument the cause was submitted and by the court ordered taken under advisement.

In the Supreme Court of the State of Idaho, — Term.

WILLIAM KINZELL, Respondent,

vs.

CHICAGO, MILWAUKEE & ST. PAUL RAILWAY COMPANY, a Corporation, Appellant.

On an Appeal from the District Court of the First Judicial District in and for Shoshone County.

This cause having been heretofore heard, submitted and taken under advisement by the Court, and the Court having fully considered the same, now on this day the cause was again called, and the decision of the Court is delivered by Justice Rice to the effect that the judgment of the lower court be reversed.

It is therefore considered, adjudged and decreed by the Court, that the judgment of the District Court of the First Judicial District in and for the County of Shoshone in the above entitled cause be and the same hereby is reversed, with instructions to dismiss the action. Costs awarded to appellant in the sum of \$212.20.

I, I. W. Hart, Clerk of the Supreme Court of the State of Idaho, do hereby certify that the foregoing is a true copy of an original

judgment entered in the above-entitled cause, on the 26th day of March, 1918, and now remaining of record in my office.

Witness, my hand and seal of the Court, affixed at my office, this 3rd day of May, 1918.

[SEAL.]

I. W. HART, *Clerk*,  
By ———, *Deputy Clerk*.

Copy.

294 In the Supreme Court of the State of Idaho.

WILLIAM KINZELL, Respondent,

v.

CHICAGO, MILWAUKEE & ST. PAUL RAILWAY COMPANY, a Corporation,  
a Corporation, Appellant.

*Opinion of the Court.*

Boise, January Term, 1918.

Filed Mar. 26,

1918. I. W. Hart, Clerk.

Master and Servant—Interstate Commerce—Federal Employers' Liability Act.

1. A laborer employed in the construction of a fill beneath a wooden trestle, which when completed was intended to take the place of the trestle and to support the track of a railroad company engaged in the transportation of both intrastate and interstate commerce, is not engaged in interstate commerce so as to entitle him to maintain an action for personal injuries under the Federal Employers' Liability Act of April 22, 1908, chap. 149, 35 Stat. at L. 65.

Appeal from the District Court of the First Judicial District for Shoshone County. Hon. William W. Woods, Judge.

Action for damages for personal injuries. Judgment for plaintiff. Reversed.

G. W. Korte and Bobt. H. Elder for appellant.

John P. Gray, W. D. Keeton, W. F. McNaughton and Jas. A. Wayne for respondent.

RICE, J.:

William Kinzell brought this action to recover damages for personal injuries received by him while in the employ of a railway company engaged in both intrastate and interstate commerce. The injuries complained of were received in the State of Washington

while appellant was engaged in constructing a dirt fill beneath a wooden trestle, known as Bridge No. 140 near the town of Ewan, Wash., which fill was intended eventually to support the track. The material with which the fill was being constructed was obtained from new construction work entirely within the State of Washington, and no question of interstate commerce was thereby involved. The fill had progressed to the extent that it had in places reached the railroad ties and it had become necessary, after dumping the cars of dirt, to use what is known as a "bulldozer" to spread the dirt away from the track and thereby widen the fill. The bulldozer employed in this case was a flat car with adjustable wings extending on either side from a point slightly over each rail and spreading out toward the back of the car.

295 The principal duty of respondent was to adjust these wings, and at times when they were waiting for another train load of dirt, he and Hiram Lee, another employe upon the dozer, used shovels to clean out the rocks that lodged between the tracks. The dirt was being brought to the fill by means of two trains of about twenty-five "air dump" cars each. When the train approached the bridge, it would couple onto the dozer and proceed to the place where the dirt was to be dumped. After dumping the dirt the cars would be righted and the train would start back, pulling the dozer after it. The wings of the dozer would level down the dirt dumped, spreading it away from the track and thus widen the fill.

At the time of his injury, respondent was standing on the front of the dozer waiting for the dirt train to couple on. While he was waiting he was looking over the fill to determine where this train load of dirt should be dumped. He contends that through negligence of the appellant, the train was going at so great a rate of speed when it coupled onto the dozer that it broke his hold on the cross rods and crank shaft and threw him violently to the ground between the wheels of the head car and injured him severely.

Before the trial of this case appellant moved to have the respondent make an election of remedies, and respondent elected to bring his case under the Federal Employers' Liability Act, 35 Stat. at L., chap. 149, p. 65, the material part of which is as follows:

"That every common carrier by railroad while engaging in commerce between any of the several states \* \* \* shall be liable in damages to any person suffering injury while he is employed by such carrier in such commerce \* \* \* for such injury resulting in whole or in part from the negligence of any of the officers, agents or employes of such carrier, or by reason of any defect or insufficiency due to its negligence in its cars, engines, appliances, machinery, track, roadbed, works, boats, wharfs or other equipment."

While a number of errors are assigned which appear to be worthy of careful consideration, the question which will dispose of the case, according to the conclusion we have reached, is whether respondent was within the terms of the act at the time the injury occurred.

The other matters presented will not, therefore, be discussed in this opinion.

Respondent suggests that the act is remedial in its character and should be so construed as to prevent the mischief and advance the remedy. Citing, *St. Louis etc. R. Co. v. Conley*, 187 Fed. 949; *Bolch v. C. M. & St. P. R. Co.*, 155 Pac. (Wash.) 422. The construction of the act, however, does not admit of any discretion on the part of the court, nor are the rules of strict or liberal construction applicable.

The sole question presented by this feature of the case is whether respondent was engaged in interstate commerce at the time the accident occurred, and therefore has a cause of action arising under the federal statute, or whether he must seek his remedy under the Workmen's Compensation Act of the State of Washington. *Raymond v. C. M. & St. P. R. Co.*, 243 U. S. 43, 61 L. Ed. 583.

Many cases have arisen in which the courts have been called upon to lay down rules by which this question shall be determined. It is held that the employe must at the time of his injury be employed in interstate commerce. *Ill. Cent. R. Co. v. Behrens*, 233 U. S. 473, 58 L. Ed. 1051; *Shanks v. D. L. & W. R. Co.*, 239 U. S. 556, 60 L. Ed. 436.

In the last cited case it is said:

"Having in mind the nature and usual course of the business to which the act relates, and the evident purpose of Congress in adopting the act, we think it speaks of interstate commerce, not in a technical legal sense, but in a practical one better suited to the occasion (See *Swift & Co. v. U. S.*, 196 U. S. 375, 398; 49 L. Ed. 518, 525; 25 Sup. Ct. Rep. 276), and that the true test of employment in such commerce in the sense intended, is, was the employe at the time of the injury engaged in interstate transportation, or in work so closely related to it as to be practically a part of it?"

Applying the test, it is held that one engaged in repairing or keeping in usable condition a roadbed, bridge, engine, car or other instrument then in use in such transportation, is engaged in interstate commerce. *Pedersen v. D. L. & W. R. Co.*, 229 U. S. 146, 57 L. Ed. 1125; *San Pedro etc. R. Co. v. Davide*, 210 Fed. 870; *Phila. etc. R. Co. v. McConnell*, 228 Fed. 263; *Southern Ry. Co. v. McGuin*, 240 Fed. 649; *Cincinnati Ry. Co. v. Hall*, 243 Fed. 76.

So, also, one engaged in an act incidental to his employment in interstate transportation comes within the provisions of the act. *Erie R. Co. v. Winfield*, 244 U. S. 170, 61 L. Ed. 1057; *Louisville etc. R. Co. v. Parker*, 242 U. S. 13, 61 L. Ed. 119; *N. Y. C. R. Co. v. Carr*, 238 U. S. 260, 59 L. Ed. 1298; *Lamphere v. O. R. & N. Co.*, 196 Fed. 336.

But one engaged in an employment upon an article which may ultimately become an element of interstate commerce, but which is too remote to be directly connected therewith, or incidental thereto, is not engaged in interstate commerce within the meaning of the act.

D. L. & W. R. Co. v. Yurkonis, 238 U. S. 439, 59 L. Ed. 1397; C. B. & Q. R. Co. v. Harrington, 241 U. S. 177, 60 L. Ed. 941; Lehigh etc. R. Co. v. Barlow, 244 U. S. 183, 61 L. Ed. 1070; Shanks v. D. L. & W. R. Co., *supra*; Minn. & St. L. R. Co. v. Winters, 242 U. S. 353, 61 L. Ed. 358; N. Y. C. R. Co. v. Carr, *supra*.

It is well settled that new construction of either roadbed or equipment, designed ultimately to be used in interstate commerce, is not, while in the process of building, an instrument of interstate commerce, and one injured while employed about the same is not within the terms of the act. *Raymond v. C. M. & St. P. R. Co.*, *supra*; *Bravis v. C. M. & St. P. R. Co.*, 217 Fed. 234; *Minn. & St. L. R. Co. v. Nash*, 242 U. S. 619; 61 L. Ed. 531; *N. Y. C. R. Co. v. White*, 243 U. S. 188, 61 L. Ed. 667; *C. & E. R. Co. v. Steele*, 108 N. E. (Ind.) 4; *McKee v. Ohio etc. R. Co.*, 88 S. E. (W. Va.) 616.

In the case of *Louisville etc. R. Co. v. Parker*, *supra*, it is said:

"The business upon which the deceased was engaged at the moment was transferring an empty car from one switch track to another. This car was not moving in interstate commerce and that fact was treated as conclusive by the court of appeals. In this the court was in error, for if, as there was strong evidence to show and as the court seemed to assume, this movement was simply for the purpose of reaching and moving an interstate car, the purpose would control and the business would be interstate." *N. Y. C. R. Co. v. Carr*, *supra*.

We are of the opinion that constructing a fill to take the place of a trestle which is being used in interstate commerce is new construction, and that the fill does not become a part of the railroad until it is completed and the track is placed upon it instead of upon the trestle. *U. S. v. C. M. & P. S. R.*, 219 Fed. 632; *Dickinson v. Industrial Board of Illinois*, 117 N. E. (Ill.) 438. *Columbia P. R. Co. v. Sauter*, 223 Fed. 604, is not to the contrary, for in that case the main purpose of the work was directly connected with the transportation of interstate commerce.

It is suggested that the material composing the fill necessarily added support to the trestle in the course of the construction thereof. This is an inference which does not follow from the testimony in the case. But if it were true, it is but an incident to the work of making the fill and not a purpose in view in its construction. It is true one of the duties of respondent was to remove dirt and rocks from the track, which lodged thereon when the cars were dumped and which might, if allowed to accumulate, interfere with interstate commerce. This, however, was but an incident to the work of constructing the fill and did not change the character of the employment. The object of the work, as pointed out in the *Parker* case, is controlling.

298 It follows that respondent does not come within the provisions of the Federal statute, and that the action cannot be

maintained. The judgment is reversed with instructions to dismiss the action. Costs awarded to appellant.

Budge, C. J., and Morgan, J., concur.

WILLIAM KINZELL, Respondent,

v.

CHICAGO, MILWAUKEE & ST. PAUL RAILWAY COMPANY,  
a Corporation, Appellant.

*Præcipe.*

To the Clerk of the Above Entitled Court:

You are hereby requested to make a transcript of the record of this cause to be used in an application to the Supreme Court of the United States for a Writ of Certiorari in said cause, the transcript to consist of:

The record on appeal in said cause;

The opinion of the Supreme Court of the State of Idaho;

All journal entries contained in the records and proceedings of the Supreme Court of the State of Idaho relating to said cause;

The final judgment and decision of the Supreme Court of the State of Idaho:

Your certificate to the record that it is a complete record in said cause.

Dated this 24 day of April, 1918.

JOHN P. GRAY,

*Attorney for William Kinzell.*

Endorsed: Filed this 27th day of April, 1918. I. W. Hart, Clerk.

WILLIAM KINZELL, Petitioner,

vs.

CHICAGO, MILWAUKEE & ST. PAUL RAILWAY COMPANY,  
a Corporation, Respondent.

*Clerk's Certificate to Record.*

I, I. W. Hart, Clerk of the Supreme Court of the State of Idaho, do hereby certify that the foregoing, consisting of 299 numbered pages, is a true and complete transcript of the record on appeal to this court, comprising the record on appeal from the District Court 299 of the First Judicial District in and for Shoshone County to this Court, Journal Entry relative to the hearing of said appeal, opinion of the court thereon, final Judgment of this Court on said Appeal, and *Præcipe* for preparation of said record.



In Witness whereof I have hereto set my hand and affixed the Seal of the Court, this 16th day of May, 1918.

[SEAL.]

I. W. HART,

*Clerk of the Supreme Court of the State of Idaho.*

300 UNITED STATES OF AMERICA, *ss.*:

The President of the United States of America to the Honorable the Judges of the Supreme Court of the State of Idaho, Greeting:

Being informed that there is now pending before you a suit in which Chicago, Milwaukee & St. Paul Railway Company is appellant, and William Kinzell is respondent, which suit was removed into the said Supreme Court by virtue of an appeal from the District Court of the First Judicial District, in and for Shoshone County, and we, being willing for certain reasons that the said cause and the record and proceedings therein should be certified by the said Supreme Court and removed into the Supreme Court of the

301 United States, Do hereby command you that you send without delay to the said Supreme Court, as aforesaid, the record and proceedings in said cause, so that the said Supreme Court may act thereon as of right and according to law ought to be done.

Witness the Honorable Edward D. White, Chief Justice of the United States, the twenty-fourth day of October, in the year of our Lord one thousand nine hundred and eighteen.

JAMES D. MAHER,

*Clerk of the Supreme Court of the United States.*

302 [Endorsed:] File No. 26571. Supreme Court of the United States, October Term, 1918. No. 485. William Kinzell vs. Chicago, Milwaukee & St. Paul Railway Company. Writ of Certiorari. Filed Nov. 9, 1918. I. W. Hart, Clerk Sup. Ct. of Idaho.

303 In the Supreme Court of the State of Idaho.

I, I. W. Hart, Clerk of the Supreme Court of the State of Idaho, in pursuance of the command of the foregoing writ of certiorari, do hereby certify that the foregoing printed transcript consisting of 298 numbered pages, is a full, true and complete transcript of the record on appeal to this court, comprising the record on appeal from the District Court of the First Judicial District of the State of Idaho in and for Shoshone County, to this court, also a full, true and correct transcript of the proceedings of this court consisting of Journal Entry relative to the hearing of said appeal, Opinion of the court thereon, final Judgment of this court on said appeal, in the cause wherein William Kinzell was respondent and Chicago, Milwaukee & St. Paul Railway Company, a corporation was appellant.

I do further certify that the original exhibits in said cause were by me transmitted to the clerk of the Supreme Court of the United

States to be used upon an application to the said Supreme Court of the United States for a writ of certiorari in the said cause, and the said exhibits are now filed in the office of the said Clerk of the Supreme Court of the United States. That said exhibits were transmitted by order of the Chief Justice of the Supreme Court of the State of Idaho, except a model of a dump car which was exhibited in the case but which was withdrawn by counsel for the Chicago, Milwaukee & St. Paul Railway Company with the consent of the court and of counsel for William Kinzell.

304 In witness whereof I have hereunto set my hand and affixed the seal of the Supreme Court of the State of Idaho in the City of Boise, State of Idaho, this 16 day of November, 1918.

[Seal of Supreme Court, State of Idaho.]

I. W. HART,  
*Clerk of the Supreme Court.*

305 [Endorsed:] File No. 26571. Supreme Court U. S., October Term, 1918. Term No. 485. William Kinzell, Petitioner, vs. Chicago, Milwaukee & St. Paul Railway Company. Writ of certiorari and return. Filed November 20, 1918.

# **In The Supreme Court of The United States**

---

**OCTOBER TERM, 1918**

---

**William Kinzell,**

**Petitioner,**

**against**

**Chicago, Milwaukee & St. Paul  
Railway Company, a corporation,  
Respondent.**

**No. 485**

---

**On Writ of Certiorari to the Supreme Court of the  
State of Idaho.**

---

**Motion by William Kinzell, Petitioner, to Place on  
the Summary Docket.**

---

Comes now the petitioner, William Kinzell, and respectfully moves the court to place the above entitled cause on the summary docket.

## **STATEMENT**

This action was brought in a state court of Idaho by petitioner on account of injuries sustained by him

while in the employ of respondent railway company. Petitioner asserted the right to recover under the Federal Employers' Liability Act.

The injury was sustained by petitioner February 16, 1915. His suit was commenced in May, 1915, and on November 4, 1916, he recovered judgment for \$35,000. The railway company appealed to the Supreme Court of Idaho, which court reversed the judgment of the trial court upon the sole ground that at the time of his injury the petitioner was not engaged in interstate commerce.

A petition for a writ of certiorari was presented to this court based upon three grounds:

First: That the Supreme Court of the State of Idaho had misinterpreted the Federal Employers' Liability Act;

Second: That there is a substantial conflict in decisions on a vital and controlling matter of law involved in this cause between the Supreme Court of Idaho and this court in respect to the construction and application of said Federal Employers' Liability Act;

Third: Because there is a like conflict in decisions of the Supreme Court of Idaho and decisions of the Circuit Courts of Appeals for the Fourth and Sixth Circuits.

The writ of certiorari was granted by this court October 21, 1918.

There are several reasons why this case should be advanced and placed upon the summary docket:

First: The decision of the Supreme Court of Idaho in this case has introduced a conflict of decisions with respect to the Federal Employers' Liability Act which will continue until this court shall have passed upon the question involved, and for that reason the case clearly involves and affects a matter of general public interest;

Second: The case involves the construction of a statute of the United States which has been frequent-

ly before this court, with the terms and interpretation of which this court is familiar and which should not require extended argument;

Third; The Federal Employers' Liability Act is a remedial statute, and it is a matter of general and public interest, that its remedies be carried out with reasonable dispatch. In this case the plaintiff was injured in February, 1915, and both from the testimony in the case and from the amount of the judgment it is evident that his injuries were serious and disabling;

Fourth: Uniformity of interpretation of this act is of the highest importance. The fact that the writ has been granted affords reasonable ground to believe that in the view of this court there is a conflict of decisions, presented by the interpretation of the Supreme Court of Idaho in this case, which should not be permitted to continue.

Notice of this motion has been served on opposing counsel.

Respectfully submitted.

JOHN P. GRAY  
Counsel for Petitioner  
William Kinzell.  
Coeur d'Alene, Idaho.

TO THE ABOVE NAMED RESPONDENT and TO  
ROBERT H. ELDER and GEO. W. KORTE, At-  
torneys for respondent:

Please take notice that the foregoing motion will be presented to the Supreme Court of the United States on March 3rd, 1919.

JOHN P. GRAY,  
Attorney for Petitioner.

Service of the foregoing motion acknowledged this  
..... day of ....., 1919.

.....  
Attorney for Respondent.

IN THE  
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1918.

WILLIAM KINZELL,

*Petitioner,*

Against

CHICAGO, MILWAUKEE & ST. PAUL  
RAILWAY COMPANY, a corpora-  
tion,

*Respondent.*

---

ON WRIT OF CERTIORARI TO THE SUPREME  
COURT OF THE STATE OF IDAHO

---

**BRIEF OF RESPONDENT IN OPPOSITION TO  
THE PETITIONER'S MOTION TO PLACE  
ON THE SUMMARY DOCKET**

---

The respondent makes opposition to the granting of the petitioner's motion to place this cause on the summary docket, on the following grounds:

1. The respondent is entitled to have a printed copy of the whole record which the writ of certiorari required the court below to return to this court, and until that record shall have been printed and copies issued to counsel the case will not be ripe for a hearing on the merits. The motion unreasonably assumes that the hearing in this court involves only a single question, that is, the one decided by the Supreme Court of Idaho, and that

in case of reversal of that decision the litigation will be terminated by remanding the case to the trial court for execution of the judgment rendered by that court upon the verdict of the jury. In view of conflicting decisions by different courts, as claimed by the petition for the writ of certiorari, that question requires full argument by counsel and deliberate consideration by the court. Half an hour on each side is not sufficient time for a fair presentation of the matters to be considered. Furthermore, the assumption that the case may be finally disposed of by a decision of this court adverse to the decision of the Supreme Court of Idaho is unreasonable because, other questions are involved in the case which have not been decided, and which, in its opinion the Supreme Court of Idaho stated, merit careful consideration. The respondent's assignments of error raise questions as to the fairness of the trial, and we respectfully maintain that, by the record, it appears that proceedings on the trial were shameful. Questions of law are raised by allegations of errors in the giving and refusal of instructions to the jury. And the enormous amount of the verdict challenges the attention of an appellate tribunal. The unfairness of depriving the respondent of any opportunity to submit these important questions for decision by an appellate court is apparent.

2. With respect to the practice in cases brought to this court by certiorari from State tribunals, this case is one of first impressions because the case is here on a writ of certiorari granted under authority conferred by a new statute; therefore, the scope of the court's jurisdiction must be considered and passed upon. Is the cause in its entirety now lodged in this court for the purpose of a complete review of the record and determination by this court of all the questions raised by the



respondent's assignments of error, or will the hearing and decision be restricted to the single question decided by the Supreme Court of Idaho? Undoubtedly, affirmance of that decision by this court will be a final determination of the rights of the parties in the cause, but, in case of reversal of that decision, will the case be remanded to the trial court for execution of its judgment, or will the mandate be directed to the Supreme Court of Idaho, in the usual form when cases are reversed, for further proceedings not inconsistent with the decision of this court?

Formerly the only method of bringing to this court for review decisions of State courts was by a writ of error, and the jurisdiction of this court was limited to the consideration of federal questions or questions pertaining to national affairs. Whilst in causes brought to this court from federal courts of inferior jurisdiction, by a writ of certiorari, the jurisdiction of this court was not so limited, but was full and complete so that all questions, whether contested in the court of original jurisdiction or not, were subject to final determination here.

On reviewing a final decree of the federal court by virtue of a writ of certiorari this court is called upon to notice and rectify any error that may have occurred in the interlocutory proceedings.

*Hamilton-Brown Shoe Co., v. Wolf Bros. & Co.*,  
240 U. S. 251-263; 60 Law Ed. 629, and authorities cited in the opinion of the court by Mr. Justice Pitney.

The act of Congress under authority of which the writ was granted in this case (Act of September 6, 1916,

39 U. S. Stat. 726; U. S. Compiled Stat. 1918, Compact Ed., Sec. 1214) prescribes that:

“It shall be competent for the Supreme Court by certiorari or otherwise, to require that there be certified to it for review and determination with the same power and authority and with like effect as if brought up by a writ of error, any cause wherein a final judgment or decree has been rendered or passed by the highest court of a state in which a decision could be had, \* \* \* where any title, right, privilege, or immunity is claimed,” etc.

According to the letter of this statute, authority is conferred upon the supreme court by certiorari to require that there be certified to it *for review and determination any cause* of the classes specified. It is *a cause* that may be brought up, not a mere controversy in a cause, nor a question involved therein, but it is *the cause* that may be brought up, and *the cause* may be brought up *for review and determination*. Therefore, the respondent has a right to apprehend that this court may hold that the case in its entirety is here for review and determination. A reason for a literal interpretation of the words of the act is, that it may be presumed that Congress intended that the exercise of its appellate jurisdiction by this court in cases originating in the state courts should be uniform and harmonious with jurisdiction and practice in cases which were originally litigated in federal courts of inferior jurisdiction.

One of the errors assigned at bar is, refusal of the trial court to give a peremptory instruction to the jury, requested by the respondent, to render a verdict in the defendant's favor. That assignment of error challenges the sufficiency of the evidence to sustain jurisdiction of a federal court, and even if this court should not concur

in the decision rendered by the Idaho Supreme Court, for the particular reason on which that decision was rested, its judgment may, nevertheless, be affirmed for other good and sufficient reasons, and it will not tend to expedite the cause to send it back without correcting a very palpable error of the trial court with respect to its jurisdiction, founded upon the Employers' Liability Act.

*St. Louis, I. M. & S. Ry. vs. McWhirter*, 229 U. S. 265.

Wherefore, in order that there shall be no failure to make a full and complete presentation of the cause on the respondent's part, it is our intention to submit at the proper time a brief covering all the points wherein we believe that law and justice require an affirmance of the decision by the Supreme Court of Idaho, and we protest against any disposition that may be made of the case upon such a hearing as may be had if the petitioner's motion should be granted.

Respectfully submitted,

Heenan H. Field

Gron Korte

*Attorneys for Respondent.*

No. 485

JAMES D. MA

IN THE  
SUPREME COURT  
OF THE  
UNITED STATES

OCTOBER TERM, 1918

WILLIAM KINZELL,

*Petitioner.*

*against*

CHICAGO, MILWAUKEE & ST.  
PAUL RAILWAY COMPANY, a  
corporation,

*Respondent.*

*On Petition for a Writ of Certiorari to the  
Supreme Court of Idaho.*

PETITION, BRIEF AND COPY OF OPINION  
OF THE SUPREME COURT  
OF IDAHO.

JOHN P. GRAY,

*Counsel for Petitioner.*



IN THE  
SUPREME COURT  
OF THE  
UNITED STATES

OCTOBER TERM, 1918

---

WILLIAM KINZELL,

*Petitioner.*

*against*

CHICAGO, MILWAUKEE & ST.  
PAUL RAILWAY COMPANY, a  
corporation,

*Respondent.*

---

*On Petition for a Writ of Certiorari to the  
Supreme Court of Idaho.*

---

PETITION, BRIEF AND COPY OF OPINION  
OF THE SUPREME COURT  
OF IDAHO.

---

JOHN P. GRAY,

*Counsel for Petitioner.*





## TABLE OF CONTENTS.

	Page
Petition .....	1
Opinion of Supreme Court of Idaho.....	17
Brief in support of petition .....	26
Notice of submission.....	51

## LIST OF CASES REFERRED TO IN PETITION OR BRIEF.

	Page.
<i>Cincinnati N. O. &amp; T. P. R. Co. v. Hall,</i> 243 Fed. 76.....	12, 45
<i>Columbia &amp; P. S. R. Co. v. Sauter,</i> 223 Fed. 604 (C. C. A. 9th Cir.).....	33
<i>Delaware L. &amp; W. R. Co. v. Urkonis,</i> 238 U. S. 439.....	35
<i>Dickinson v. Industrial Board of Illinois,</i> 280 Ill. 342.....	38, 40
<i>Forsyth v. Hammond,</i> 166 U. S. 506.....	49
<i>Pederson v. D. L. &amp; W. R. Co.,</i> 229 U. S. 146.....	11, 31, 42, 47
<i>Philadelphia B. &amp; W. R. Co. v. McConnell,</i> 228 Fed. 263.....	42
<i>Raymond v. C. M. &amp; St. P. R. Co.,</i> 243 U. S. 43.....	11, 12, 35, 36
<i>Shanks v. D. L. &amp; W. R. Co.,</i> 239 U. S. 556.....	29, 35
<i>Southern Ry Co. v. M'Guin,</i> 240 Fed. 649.....	13, 47
<i>United States v. C. M. &amp; P. S. Ry Co.,</i> 219 Fed. 632.....	38

IN THE  
SUPREME COURT  
OF THE  
UNITED STATES

OCTOBER TERM, 1918

---

WILLIAM KINZELL,

*Petitioner.*

*against*

CHICAGO, MILWAUKEE & ST.  
PAUL RAILWAY COMPANY, a  
corporation,

*Respondent.*

---

*On Petition for a Writ of Certiorari to the  
Supreme Court of Idaho.*

---

PETITION, BRIEF AND COPY OF OPINION  
OF THE SUPREME COURT  
OF IDAHO.

---

*To the Honorable*

THE CHIEF JUSTICE AND ASSOCIATE JUSTICES OF  
THE SUPREME COURT OF THE UNITED STATES.

Your petitioner, William Kinzell, respectfully  
presents to this court this his petition for a writ of

*certiorari* addressed to the Supreme Court of the State of Idaho, commanding said court and the clerk thereof to certify to this court the record and proceedings of the case in said court wherein your petitioner was respondent and the respondent, Chicago, Milwaukee & St. Paul Railway Company, a corporation of the State of Wisconsin, was appellant, together with its opinion therein for the review and determination of said cause by this court.

The reasons relied on for the issuance of said writ and upon which your petitioner believes that a writ ought to be issued, and which will be more fully stated hereafter may be summarized as follows:

First: The Supreme Court of the State of Idaho misinterpreted the Federal Employers' Liability Act of April 22, 1908, Chapter 149, 35 Stats. at Large, page 65, in holding that the petitioner was not engaged in interstate commerce within the meaning of said act at the time of receiving his injury.

Second: "In the interest of jurisprudence and uniformity of decision" between this court and the said Supreme Court of the State of Idaho there being a substantial conflict of decisions on a vital and controlling matter of law involved in this cause between the said Supreme Court of the State of Idaho

and this court in respect to the construction and application of said Federal Employers' Liability Act.

Third: Because there is in like manner a conflict in decisions between the said Supreme Court of the State of Idaho and decisions of the Circuit Courts of Appeals for the Fourth and Sixth Circuits on a controlling and decisive question of law involved in this case in respect to the construction and application of the said Federal Employers' Liability Act.

In this behalf your petitioner states the following facts:

Your petitioner brought this action against the respondent in a state court of competent jurisdiction in the State of Idaho to recover damages for personal injuries, resting his right of action solely upon the Federal Employers' Liability Act.

The respondent was engaged in operating a railroad extending from Chicago, Illinois, to Seattle, Washington, used for the transportation of both interstate and intrastate commerce.

The injuries complained of were received in the State of Washington while petitioner was engaged in filling with dirt a wooden trestle upon the main line railroad track of the respondent. The

fill had progressed to the extent that the dirt had reached the top of the railroad ties and rails and it had become necessary after dumping cars of dirt to use a machine known as a bulldozer to spread the dirt away from the track, thereby widening the fill and keeping the track clear. The bulldozer was a flat car with adjustable wings extending on either side from a point slightly over the rails and spreading out toward the back of the car.

The duty of the petitioner was to adjust these wings to determine where dirt should be dumped and while waiting for another trainload of dirt, with his coemployee, use shovels to clear the track of rocks and material which had lodged between the rails. The wings of the bulldozer were outside of the rails of the track and only spread the dirt from the rails outward, the petitioner and his co-employee cleaning the inside thereof with their shovels.

During the time this work was being carried on, the interstate trains of respondent were passing to and fro over the said track and trestle.

The dirt was being transported to the trestle by means of two trains of about 25 dump cars each. When the train approached the bridge it would couple onto the dozer and proceed to the place where

the dirt was to be dumped, as directed by your petitioner. After dumping the dirt, the cars would be righted, the train start back pulling the dozer after it. The wings of the dozer would then be operated so as to level down the dirt which had been dumped, and the dozer would be uncoupled from the dump train and left at or near the end the bridge, then the petitioner and his co-employe would take shovels and clear between the rails.

At the time of receiving his injury, your petitioner was standing on the front of the dozer waiting for the dirt train to couple on. While so waiting, he was looking over the fill to determine where the next trainload of dirt should be dumped.

Your petitioner asserted that through the negligence of the respondent, the train, while approaching the dozer, was going at so great a rate of speed that when it coupled onto the dozer it broke his hold upon the cross-rods and crank shaft, threw him violently to the ground between the wheels of the rear car and the dozer and severely and permanently injured him.

The case was tried before a jury. The trial court held that the petitioner was engaged at the time of his injury in interstate commerce and was

entitled to maintain his action under the Federal Employers' Liability Act, and submitted the questions of fact to the jury for determination.

A general verdict was returned in favor of the petitioner and in addition thereto, at the request of the respondent, certain interrogatories were submitted to the jury for answer, and by their answers the jury found the petitioner free from contributory negligence.

The railroad company asked for a new trial. Its petition therefor was denied and an appeal was taken to the Supreme Court of the State of Idaho. The Supreme Court of the State of Idaho reversed the judgment on the sole ground that this petitioner was not engaged in interstate commerce at the time of his injury so as to entitle him to maintain an action for personal injury under the Federal Employers' Liability Act, and directed that the judgment be reversed, with instructions to dismiss the action.

Your petitioner is advised that the said judgment of the Supreme Court of the State of Idaho is final and is erroneous and This Honorable Court should require the case to be certified to it for its review and determination.



Your petitioner further amplifies the grounds for requesting that a writ of *certiorari* be ordered herein.

First: The Supreme Court of Idaho misinterpreted the Federal Employers' Liability Act and the decisions of this court, particularly the decisions of this court in the case of

*Pedersen v. D. L. & W. R. Co.*, 229 U. S. 146

*Raymond v. C. M. & St. P. R. Co.*, 243 U. S. 43

in holding that the employment in which the petitioner was engaged was new construction work; that the work which he was performing was being done independently of interstate commerce in which the defendant was engaged, and was a matter of indifference to that commerce and not so closely connected therewith as to be a part of it.

Your petitioner respectfully contending that the replacing of the bridge which had long been an instrumentality used in Interstate commerce with a fill and the employment of petitioner in keeping the track, both outside the rails and between the rails, clear of obstructions for the purpose of permitting interstate trains to operate over the said piece of track during the course of the replacement, was work

of such character that the petitioner was within the terms of the Federal Employers' Liability Act.

Second: The Supreme Court of Idaho, as your petitioner respectfully contends, has misconstrued and misapplied the decisions of this court, as in the first ground above stated, in holding that the petitioner was not engaged at the time of his injury in interstate commerce within the meaning of said Federal Employers' Liability Act, but was engaged in new construction work which was being done independently of interstate commerce in which the defendant was engaged and was not so closely connected therewith as to be a part of it.

The decision of said Supreme Court of Idaho is in conflict with the decision of this court in the Pedersen case and misconstrues and misapplies both the decision in that case and the decision of this court in

*Raymond v. C. M. & St. P. R. Co.*, 243 U. S. 43

Third. A conflict of decisions exists between the Supreme Court of the State of Idaho in this case and the Circuit Court of Appeals for the Sixth Circuit in a like case, to-wit, the case of

*Cincinnati N. O. & T. P. R. Co. vs. Hall*, 243 Fed. 76

in which case the Circuit Court of Appeals for the Sixth Circuit held that work being performed in replacing an old bridge with a new one was of such character that an employe engaged in the work was engaged in interstate commerce within the meaning of said Federal Employers' Liability Act.

A conflict of decisions also exists between said Supreme Court of the State of Idaho in this case and the Circuit Court of Appeals for the Fourth Circuit in the case of

*Southern Ry. Co. v. M'Guin*, 240 Fed. 649

in which *certiorari* was denied by this court, 244 U. S. 653.

Your petitioner in the brief accompanying this petition will more particularly elaborate upon the foregoing questions.

Your petitioner presents herewith a certified copy of the entire record in said cause, including the proceedings in the Supreme Court of the State of Idaho and the opinion of said court.

WHEREFORE, your petitioner respectfully prays that a writ of *certiorari* be issued under the seal of this Court, directed to the Supreme Court of the State of Idaho, sitting at Boise, Idaho, commanding the said Court to certify and send to this

court on day to be designated, a full and complete transcript of the record and all proceedings of the said Supreme Court of the State of Idaho had in said cause. To the end that the said cause may be reviewed and determined by this honorable court as provided by law and that the said judgment of the Supreme Court of the State of Idaho be reversed by this honorable court and for such further relief as may seem proper. And your petitioner will ever pray.

JOHN P. GRAY,  
Coeur d'Alene, Idaho.  
Counsel for Petitioner.

STATE OF IDAHO,  
COUNTY OF KOOTENAI—ss.

JOHN P. GRAY, being first duly sworn, on oath deposes and says that he is the counsel for petitioner, Wm. Kinzell; that he has read the foregoing annexed petition and knows well the contents thereof; that he has also carefully read and studied a duly certified copy of the transcript of record which accompanies the petition herein, being the transcript of record in the case at bar; that the matters in said petition are in the judgment of this affiant duly supported in and by said transcript of record, and that he knows of the above proceedings had, and that the acts in said petition herein stated are true to the best of his knowledge and belief.

JOHN P. GRAY.

Subscribed and sworn to before me this 21st day of May, 1918.

(Seal)

F. MEADE,

Notary Public in and for the State of Idaho, residing at Coeur d'Alene, Idaho.

My commission expires Sept. 9, 1919.

I do hereby certify that I have carefully examined the foregoing petition for a writ of *certiorari* and the allegations thereof are true, as I verily believe, and in my opinion the petition is well founded and the case is one in which the prayer of the petition should be granted by this court.

JOHN P. GRAY.

Counsel for Petitioner.

## APPENDIX

---

### OPINION OF THE SUPREME COURT OF IDAHO.

William Kinzell, respondent v. Chicago, Milwaukee & St. Paul Railway Company, a corporation, appellant. Boise January Term, 1918. Filed Mar. 26, 1918. I. W. Hart, Clerk. Master & Servant—Interstate Commerce—Federal Employers' Liability Act.

1. A laborer employed in the construction of a fill beneath a wooden trestle, which when completed was intended to take the place of the trestle and to support the track of a railroad company engaged in the transportation of both intrastate and interstate commerce, is not engaged in interstate commerce so as to entitle him to maintain an action for personal injuries under the Federal Employers' Liability Act of April 22, 1908, chap. 149, 35 Stats. at L. 65.

Appeal from the District Court of the First Judicial District for Shoshone County. Hon. William W. Woods, Judge.



Action for damages for personal injuries. Judgment for plaintiff. *Reversed.*

Robert H. Elder for appellant.

John P. Gray, W. D. Keeton, W. F. McNaughton and Jas A. Wayne for respondent.

RICE, J.

William Kinzell brought this action to recover damages for personal injuries received by him while in the employ of a railroad company engaged in both intrastate and interstate commerce. The injuries complained of were received in the State of Washington while appellant was engaged in constructing a dirt fill beneath a wooden trestle, known as Bridge No. 140 near the town of Ewan, Wash., which fill was intended eventually to support the track. The material with which the fill was being constructed was obtained from new construction work entirely within the State of Washington, and no question of interstate commerce was thereby involved. The fill had progressed to the extent that it had in places reached the railroad ties and it had become necessary, after dumping the cars of dirt, to use what is known as a "bulldozer" to spread the dirt away from the track and thereby widen the fill. The bulldozer employed in this case was a fiat car

with adjustable wings extending on either side from a point slightly over each rail and spreading out toward the back of the car.

The principal duty of respondent was to adjust these wings, and at times when they were waiting for another train load of dirt, he and Hiram Lee, another employe upon the dozer, used shovels to clean out the rocks that lodged between the tracks. The dirt was being brought to the fill by means of two trains of about twenty-five "air dump" cars each. When the train approached the bridge, it would couple onto the dozer and proceed to the place where the dirt was to be dumped. After dumping the dirt the cars would be righted, and the train would start back, pulling the dozer after it. The wings of the dozer would level down the dirt dumped, spreading it away from the track and thus widen the fill.

At the time of his injury, respondent was standing on the front of the dozer waiting for the dirt train to couple on. While he was waiting he was looking over the fill to determine where this train load of dirt should be dumped. He contends that through negligence of the appellant, the train was going at so great a rate of speed when it coupled onto the dozer that it broke his hold on the cross rods

and crank shaft and threw him violently to the ground between the wheels of the head car and injured him severely.

Before the trial of this case appellant moved to have the respondent make an election of remedies, and respondent elected to bring his case under the Federal Employers' Liability Act, 35 Stats. at L., chap. 149, p. 65, the material part of which is as follows:

"That every common carrier by railroad while engaging in commerce between any of the general states \* \* \* shall be liable in damages to any person suffering injury while he is employed by such carrier in such commerce \* \* \* for such injury resulting in whole or in part from the negligence of any of the officers, agents or employes of such carrier, or by reason of any defect or insufficiency due to its negligence in its cars, engines, appliances, machinery, track, roadbed, works, boats, wharfs or other equipment."

While a number of errors are assigned which appear to be worthy of careful consideration, the question which will dispose of the case, according to the conclusion we have reached, is whether respondent was within the terms of the act at the time the injury occurred. The other matters presented will not, therefore, be discussed in this opinion.

Respondent suggests that the act is remedial in its character and should be so construed as to prevent the mischief and advance the remedy—Citing, *St. Louis, etc. R. Co. v. Conley*, 187 Fed. 949; *Bolch v. C. M. & St. P. R. Co.*, 155 Pac. (Wash.) 422. The construction of the act, however, does not admit of any discretion on the part of the court, nor are the rules of strict or liberal construction applicable.

The sole question presented by this feature of the case is whether respondent was engaged in interstate commerce at the time the accident occurred, and therefore has a cause of action arising under the federal statute, or whether he must seek his remedy under the Workmen's Compensation Act of the State of Washington. *Raymond v. C. M. & St. P. R. Co.*, 243 U. S. 43, 61 L. Ed. 583.

Many cases have arisen in which the courts have been called upon to lay down rules by which this question shall be determined. It is held that the employe must at the time of his injury be employed in interstate commerce. *Ill. Cent. R. Co. v. Behrens*, 233 U. S. 473, 58 L. Ed. 1051; *Shanks v. D. L. & W. R. Co.*, 239 U. S. 556, 60 L. Ed. 436.

In the last cited case it is said:

“Having in mind the nature and usual course of the business to which the act relates, and the evident purpose of Congress in adopting the act, we think it speaks of interstate commerce, not in a technical legal sense, but in a practical one better suited to the occasion (See *Swift & Co. v. U. S.*, 196 U. S. 375, 398; 49 L. Ed. 518, 525; 25 Sup. Ct. Rep. 276), and that the true test of employment in such commerce in the sense intended, is, was the employe at the time of the injury engaged in interstate transportation, or in work so closely related to it as to be practically a part of it?”

Applying the test, it is held that one engaged in repairing or keeping in usable condition a roadbed, bridge, engine, car or other instrument then in use in such transportation, is engaged in interstate commerce. *Pedersen v. D. L. & W. R. Co.*, 229 U. S. 146 57 L. Ed. 1125; *San Pedro etc. R. Co. v. Davide*, 210 Fed. 870; *Phila. etc. R. Co. v. McConnell*, 228 Fed. 263; *Southern Ry. Co. v. McGuin*, 240 Fed. 649; *Cincinnati Ry Co. v. Hall*, 243 Fed. 76.

So, also, one engaged in an act incidental to his employment in interstate transportation comes within the provisions of the act. *Erie R. Co. v. Winfield*, 244 U. S. 170, 61 L. Ed. 1057; *Louisville, etc. R. Co. v. Parker*, 242 U. S. 13, 61 L. Ed. 119; *N. Y. C. R. Co. v. Carr*, 238 U. S. 260, 59 L. Ed. 1298; *Lamphere v. O. R. & N. Co.*, 196 Fed. 336.

But one engaged in an employment upon an article which may ultimately become an element of interstate commerce, but which is too remote to be directly connected therewith, or incidental thereto, is not engaged in interstate commerce within the meaning of the act. *D. L. & W. R. Co. v. Yurkonis*, 238 U. S. 439 59 L. Ed. 1397; *C. B. & Q. R. Co. v. Harrington*, 241 U. S. 177, 60 L. Ed. 941; *Leheigh, etc. R. Co. v. Barlow*, 244 U. S. 183, 61 L. Ed. 1070; *Shanks v. D. L. & W. R. Co.*, *supra*; *Minn. & St. L. R. Co. v. Winters*, 242 U. S. 353, 61 L. Ed. 358 *N. Y. C. R. Co. v. Carr*, *supra*.

It is well settled that new construction of either roadbed or equipment, designed ultimately to be used in interstate commerce, is not, while in the process of building, an instrument of interstate commerce, and one injured while employed about the same is not within the terms of the act. *Raymond v. C. M. & St. P. R. Co.*, *supra*; *Bravis v. C. M. & St. P. R. Co.*, 217 Fed. 234; *Minn. & St. L. R. Co. v. Nash*, 242 U. S. 619, 61 L. Ed. 531; *N. Y. C. R. Co. v. White*, 243 U. S. 188, 61 L. Ed. 667; *C. & E. R. Co. v. Steele*, 108 N. E. (Ind.) 4; *McKee v. Ohio etc. R. Co.*, 88 S. E. (W. Va.) 616.

In the case of *Louisville etc. R. Co. v. Parker*, *supra*, it is said:

"The business upon which the deceased was engaged at the moment was transferring an empty car from one switch track to another. This car was not moving in interstate commerce, and that fact was treated as conclusive by the court of appeals. In this the court was in error, for if, as there was strong evidence to show and as the court seemed to assume, this movement was simply for the purpose of reaching and moving an interstate car, the purpose would control and the business would be interstate," *N. Y. C. R. Co. v. Carr*, supra.

We are of the opinion that constructing a fill to take the place of a trestle which is being used in interstate commerce is new construction, and that the fill does not become a part of the railroad until it is completed and the track is placed upon it instead of upon the trestle. *U. S. v. C. M. & P. S. R. Co.*, 219 Fed. 632; *Dickinson v. Industrial Board of Illinois*, 117 N. E. (Ill.) 438. *Columbia P. R. Co. v. Sauter*, 223 Fed. 604, is not to the contrary, for in that case the main purpose of the work was directly connected with the transportation of interstate commerce.

It is suggested that the material composing the fill necessarily added support to the trestle in the course of the construction thereof. This is an inference which does not follow from the testimony in the case. But if it were true, it is but an incident to the work of making the fill and not a purpose in view



in its construction. It is true one of the duties of respondent was to remove dirt and rocks from the track, which lodged thereon when the cars were dumped and which might, if allowed to accumulate, interfere with interstate commerce. This, however, was but an incident to the work of constructing the fill and did not change the character of the employment. The object of the work, as pointed out in the Parker case, is controlling.

It follows that respondent does not come within the provisions of the Federal statute, and that the action cannot be maintained. The judgment is reversed, with instructions to dismiss the action. Costs awarded to appellant.

Budge, C. J., and Morgan, J., concur.

## BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

Little need be added to the statement in the petition concerning the facts. Some slight amplification, however, may be of assistance.

The bridge upon which the petitioner was employed was one of several which had been constructed in 1908, and which were being filled at or about the time of the injury complained of.

Kinzell testified that the road master of the respondent company, McGee, told him that the bridge upon which he was working had to be filled. (Record pp. 87-8)

The respondent railroad company called J. F. Pinson, an assistant engineer in charge of bridges and building. He testified on direct examination that he had made an inspection of the bridge which Kinzell was filing; he knew its life and capacity, and that from his inspection and his knowledge the life of the bridge was at least two years from the date of inspection; that the bridges had been built in 1908; that the fills were being made for the purpose of replacing the bridges. ((Record pp. 193-4) On cross examination he testified as follows:

Q. When did you make that inspection?

A. In April 1914.

Q. You said the bridge then had two years of life?

A. At least two years.

Q. You mean by that after that time you would have to fill in there or build a new bridge, is that the idea?

A. Probably at that time.

The filling was being done and the injury to the petitioner was received in February 1915, approximately one year short of the engineer's estimated life of the bridge.

The superintendent of the respondent railway company, A. E. Campbell, testified that at the time Kinzell was hurt he had charge of the work and that they were making an embankment under the bridges which would eventually replace them, the material being taken from certain line changes and grade reductions along the road. (Record, p. 189) He further testified that on the day the petitioner was injured the fill was not completed but that the rails and ties were resting on the bridge itself and not on the embankment. (Record, p. 190)

On cross examination he testified that the purpose of the work being done was two-fold; the improvement of the track, grade, etc., and at the same time the filling of the wooden bridges further west, and that during the time they were working on these bridges, filling them, interstate trains passed to and fro over the track and over the bridges; that at the time of the accident the bridge upon which the petitioner was working had been filled right up into the ties; that the "dozer" is not used until the material comes up level with the ties; that the "dozer" did not clear up the material which was dumped and which lodged between the rails; that it worked only outside of the rails; and that it was a part of Kinzell's duty to take a shovel and clear away the rocks and material which lodged between the rails; that the reason the rocks and material were required to be moved from between the rails was to make it safe for the operation of trains so that there would not be any delay through accidents occurring. (Record, pp. 191-3)

The facts, therefore, are that the fill was being made to replace a bridge on the interstate track of the defendant which had performed its duty and which, in the interest of safe operation, required replacement within a short time.

The trial court was of the opinion that the petitioner was engaged in interstate commerce within the meaning of that term as used in the Federal Employer's Liability Act and submitted the case to the jury. The jury found the railway company guilty of negligence, by answers to special interrogatories found petitioner to be free from contributory negligence, and returned a verdict in his favor.

The trial court's instruction to the jury upon the question of the plaintiff being engaged in interstate commerce is Instruction No. 14. (Record, pp. 31-2).

The Supreme Court of Idaho in its opinion discusses no question except the one as to whether or not the petitioner was employed in interstate commerce at the time of his injury within the meaning of that term as used in the Federal Employer's Liability Act. After citing *Shanks v. D. L. & W. R. Co.*, 239 U. S. 556, the court says: (Omitting citations)

“Applying the test, it is held that one engaged in repairing or keeping in usable condition a roadbed, bridge, engine, car, or other instrument then in use in such transportation is engaged in interstate commerce \* \* \* \*

But one engaged in an employment upon an article which may ultimately become an element of interstate commerce, but which is too remote to be directly connected therewith, or incidental thereto, is not engaged in interstate commerce within the meaning of the act. \* \* \*

It is well settled that new construction of either roadbed or equipment, designed ultimately to be used in interstate commerce, is not, while in the process of building, an instrument of interstate commerce, and one injured while employed about the same is not within the terms of the act \* \* \* \*

We are of the opinion that constructing a fill to take the place of a trestle which is being used in interstate commerce is new construction, and that the fill does not become part of the railroad until it is completed and the track is placed upon it instead of upon the strestle. \* \* \*

It is suggested that the material composing the fill necessarily added support to the trestle in the course of the construction thereof. This is an inference which does not follow from the testimony in the case. But if it were true, it is but an incident to the work of making the fill, and not a purpose in view in its construction. It is true one of the duties of the respondent was to remove dirt and rocks from the track, which lodged thereon when the cars were dumped, and which might, if allowed to accumulate, interfere with the interstate commerce. This however, was but an incident to the work of constructing the fill, and did not change the character of the employment. The object of the work, as pointed out in the Parker case, is controlling.

It follows that respondent does not come within the provisions of the federal statute, and that the action cannot be maintained."

The question is, therefore, clearly presented: Was the petitioner, at the time of the injury, so employed as to come within the terms of the Federal Employers' Liability Act?

The principles governing this case are well understood and the decisions of this court need not be extensively referred to. We may be permitted, however, to quote from

*Pedersen v. D. L. & W. R. Co.*, 229 U. S. 146  
where this court says:

"The true test always is: Is the work in question a part of the interstate commerce in which the carrier is engaged? \* \* \* \* Of course, we are not here concerned with the construction of tracks, bridges, engines, or cars which have not as yet become instrumentalities in such commerce, but only with the work of maintaining them in proper condition after they have become such instrumentalities and during their use as such.

True, a track or bridge may be used in both interstate and intrastate commerce, but when it is so used it is none the less an instrumentality of the former; nor does its double use prevent the employment of those who are engaged in its repair or in keeping it in suitable condition for use from being an employment in interstate commerce.



The point is made that the plaintiff was not, at the time of his injury, engaged in removing the old girder and inserting the new one, but was merely carrying to the place where that work was to be done some of the materials to be used therein. We think there is no merit in this. It was necessary to the repair of the bridge that the materials be at hand, and the act of taking them there was a part of that work. In other words, it was a minor task which was essentially a part of the larger one, as in the case when an engineer takes his engine from the roundhouse to the track on which are the cars he is to haul in interstate commerce."

This case is not one wherein it is sought to extend the doctrine of the Pedersen case, but is one in which a strict application of the conclusions in that case is determinative in the petitioner's favor.

The trestle or bridge which was being filled and the track which was being kept clear for the passage of interstate trains had long been used in interstate commerce. The work was not the construction of a new piece of line which had never become an instrumentality used in interstate commerce. According to the railroad company's own showing, the time was approaching when the bridge must, in order for the railroad company to carry on its interstate business, be either filled or replaced by a new bridge. Had the railroad company delayed until the bridge was no longer capable of supporting the

interstate trains passing along the line, the construction of a new bridge in its place would have been directly connected with the transportation of interstate commerce.

*Columbia & P. S. R. Co. v. Sauter*, 223 Fed. 604  
(C. C. A. 9th Circuit)

The Supreme Court of Idaho in its opinion concedes that such is the effect of the above decision and does not disagree therewith. In that case bridges maintained by two railroads over a certain stream had been destroyed by freshets and the two companies had joined in the construction of a trestle for the purpose of expediting travel, one company building from one side of the river and the other company building from the other side. An employe was killed during the work. His administrator prosecuted the action. The deceased was engaged at the time of his death in clearing a space in which piles could be driven, not to support the old bridge, but to support the new trestle that was being constructed. The precise question was whether or not deceased was engaged in interstate commerce at the time he was killed. The court applied the tests announced in the Pedersen case and held that the work was not being done independently of the defendant's interstate commerce, and was not a matter of indif-

ference to such commerce, but was so closely connected therewith as to be a part of such commerce.

It will doubtless be urged by respondent's counsel that the work in the Sauter case was in repairing the old bridge, which had been destroyed by the freshet; but reference to page 607 of the 223rd Federal Reporter will disclose the fact that it was agreed by counsel that:

“The deceased was engaged in making clear a space in which piles could be driven, not to support the old bridge, but to support the new trestle.”

a work which was distinctly new, but which was so intimately connected with the movement of interstate commerce as to be for all practical purposes a part of such commerce.

Is the replacement, if it precede the actual falling in of the old bridge, different in character from the replacement if the railroad company is dilatory in its duty and waits until the bridge is no longer capable of supporting traffic before it replaces it? In principle, there can be no distinction.

Following the decision in the Pedersen case, it was attempted to extend the terms of the act to include practically all employes engaged in railroad

work, however remote it might be to interstate commerce. The act was held not to cover employment in a tunnel which was only partially bored, since it was not in use and never had been in use as an instrumentality for interstate commerce.

*Raymond v. C. M. & St. P. R. Co.*, 243 U. S. 43

An employe of a railroad company, injured while mining coal in a colliery operated by the railroad company, was not within the act, even though the coal ultimately was intended by the railroad company for use in interstate commerce.

*Delaware L. & W. R. Co. v. Yurkonis*, 238 U. S. 439

An employe in a machine shop operated by a railroad company for repairing parts of locomotives used both in interstate and intrastate transportation was not within the act while engaged in taking down and putting into a new location in such shop an overhead countershaft through which the power was communicated to some of the machinery used in the repair work.

*Shanks v. D. L. & W. R. Co.* 239 U. S. 556.

Under the admitted facts, the railroad company was, in filling that trestle, engaged in maintaining its interstate road at that point in proper condition

after it had become an instrumentality of interstate commerce and during its use as such.

The Supreme Court of Idaho in this case conceives that the case comes within the rule of new construction work as in the case of

*Raymond v. C. M. & St. P. Ry. Co.*, 243 U. S. 43

The court holds that filling a trestle which is being used in interstate commerce is new construction and the fill does not become part of the railroad until it is completed and the track is placed upon it instead of upon the trestle. The conclusion is supported by two citations of authority, to which we will refer hereafter.

The conclusion, however, is in direct conflict with the language of this court in the *Pedersen* case where it is said:

“Is the work in question a part of the interstate commerce in which the carrier is engaged?

\* \* \* \* Of course, we are not here concerned with the construction of tracks, bridges, engines, or cars which have not as yet become instrumentalities in such commerce, but only with the work of maintaining them in proper condition after they have become such instrumentalities and during their use as such. \* \* \*

The point is made that the plaintiff was not, at the time of his injury, engaged in re-

moving the old girder and inserting the new one, but was merely carrying to the place where that work was to be done some of the materials to be used therein. We think there is no merit in this."

Suppose that the progress of the work on that trestle had extended to the point where the petitioner, Kinzell, was taking up a rail of the track to replace it upon the fill instead of upon the bridge. Would he not at that moment have been engaged in work which would bring him within the statute? Suppose he were removing the old ties from the trestle and replacing them upon the fill. Under the authority of the Pedersen case, would he not have been engaged in interstate commerce? The answers obviously must be that he would have been. So it was necessary preliminary to the relaying of the track, to the entire replacement of the bridge, that this other work should be done, and it was as essential thereto as it was that Pedersen should carry bolts for use in the replacement of an old girder in a bridge.

But the Supreme Court of Idaho holds that the replacement of the track even would not have been an employment within the act and that the fill would not become a part of the railroad until it had been completed and the track placed upon it. In sup-

port of its final conclusion that the petitioner was not engaged in interstate commerce at the time of his injury, the Supreme Court of Idaho cites *United States v. C. M. & P. S. Ry. Co.*, 219 Fed. 632, a district court decision, and *Dickinson v. Industrial Board of Illinois*, 280 Ill. 342.

The first case cited was an action by the United States against the railroad company for violation of the Hours of Service law (Act March 4, 1907, 34 Stat. at L. 1415, Ch. 2939). The case was submitted upon the pleadings and a stipulation. An engineer, who had previously been engaged in interstate commerce, was assigned to duty on an engine hauling a work train engaged in filling a bridge on defendant's interstate line, and he was so wholly engaged in such service for fifty-nine days, during which time he was permitted to remain on duty continuously for more than sixteen hours. The court held that the railroad company was not thereby guilty of violating the Hours of Service law, though the engineer was subject to recall for interstate service during such period and at the end thereof was reassigned to interstate commerce. The Hours of Service law provides:

"The provisions of this Act shall apply to any common carrier or carriers, their officers, agents, and employees, engaged in the transpor-



tation of passengers or property by railroad in the District of Columbia or any Territory of the United States, or from one State or Territory of the United States or the District of Columbia, or from any place in the United States to an adjacent foreign country, or from any place in the United States through a foreign country to any other place in the United States. The term 'railroad' as used in this Act shall include all bridges and ferries used or operated in connection with any railroad, and also all the road in use by any common carrier operating a railroad, whether owned or operated under a contract, agreement, or lease; and the term 'employee' as used in this Act shall be held to mean persons actually engaged in or connected with the movement of any train."

The act applies only to employees engaged in the transportation of passengers or property and by no means so broad as the Employer's Liability Act. No contention was made by the government that the employee was, because of the character of his work, within the act, but it was contended that he came within the act solely because he had been prior to that time an engineer engaged in interstate commerce and was "potentially" subject to recall. The case would not have been cited had not the court used the words "not repairing" in parenthesis in the following portion of the opinion:

"Now when analyzed, the stipulation means nothing more, as I understand it, that at one time Crown was regularly employed by the de-

fendant in moving interstate commerce; that thereafter for a period of 59 days he was regularly employed in operating a work train, wholly within the state of Idaho, for the purpose of filling (not repairing) a bridge upon a line of road which was a part of an interstate highway; that thereafter he again went back into interstate commerce service."

The decision is certainly not in point.

The Illinois case cited, *Dickinson v. Industrial Board of Illinois*, 280 Ill. 342, was one where a carpenter, employed by a railroad engaged in both interstate and intrastate commerce, employed in building forms on the margin of a right-of-way into which concrete was to be poured to form retaining walls for the elevation of the tracks, was injured by sawdust flying in his eye. It was held he was not engaged in interstate commerce. He was employed on a structure which had not yet become an instrumentality of interstate commerce. The state supreme court held that his work was a matter of indifference so far as the interstate commerce in which the railroads were engaged was concerned, although the structure to be erected might eventually become an instrumentality of such commerce.

In the case at bar, the petitioner's employment was not a matter of indifference to interstate commerce. In the first place, the structure upon which

he was working and which he was filling had already long been used in interstate commerce. In the second place, the work was being performed for the purpose of replacing that structure when it was approaching the end of its usefulness and improving the interstate roadway at that place. In the third place, his work in keeping the track clear of material which was dumped upon it was not a matter of indifference to the interstate commerce of the railroad company. His failure to perform that duty or his negligent performance thereof might easily have resulted in the derailment of an interstate train and the interference with interstate traffic. As the superintendent of the railroad said, that work was performed because it was necessary to keep the track clear and prevent accidents and derailments.

The Supreme Court of Idaho concedes and refers to the fact that it was one of the duties of the petitioner to remove dirt and rocks from the track which lodged thereon when the cars were dumped and which might, if allowed to accumulate, interfere with interstate commerce. They dispose, however, of this by holding that it was but an incident to the work of constructing and filling and did not change the character of the employment.

It was just as essential that he should spread the dirt on the outside of the rails away therefrom with the dozer as he would with the shovels clear the tracks between the rails. In both cases, he was keeping the track clear for the passage of trains. The act of keeping that trestle and that railroad track clear was performing an act for the purpose of furthering interstate commerce.

## II.

### THE REPLACEMENT OF INSTRUMENTALITIES ALREADY EMPLOYED IN INTERSTATE COMMERCE IS AN ACT IN THE FURTHERANCE OF INTERSTATE COMMERCE.

The work of replacing an old girder with a new one in a bridge used by interstate trains and the work incident thereto in carrying the material to the point of use is an employment in interstate commerce.

*Pedersen v. D. L. & W. R. Co.*, 229 U. S. 146

The replacing of old rails with new ones brings the employe engaged in such work within the Federal Employers' Liability Act.

*Philadelphia B. & W. R. Co. v. McConnell*, 228 Fed. 263 (C. C. A. 3rd Circuit)

In the above case, the employe was assistant foreman of a gang on a work train. A few days before the injury, the work train had taken new rails to a place where a track was to be repaired. The old rails were moved and new ones installed. On the day plaintiff was injured, the said train and gang were engaged in removing the old rails from where they had been left between the tracks. While plaintiff was on a car in the performance of his duties, members of the gang under the supervision of the foreman threw a rail on the car in such a manner that one end projected beyond the side of the car, was struck by a passing train, thrust against the plaintiff and injured him. The Circuit Court of Appeals used the following language, which is very apt in this case:

“The work of the train on which the plaintiff was employed had nothing to do with the immediate or direct movement of interstate commerce. Being a repair train, its direct relation was to instrumentalities of commerce rather than to the movement of commerce. With respect to its movement on the day of accident, its journey was defined and was wholly within the State of Pennsylvania. \* \* \* \*

Here the work was not being done independently of the interstate commerce in which the defendant was engaged, nor was the performance of the work a matter of indifference

so far as that commerce was concerned. The removal of old rails from between the tracks on the roadbed of a railroad over which moves heavy traffic, both interstate and intrastate, constitutes keeping the tracks and roadbed in suitable condition for interstate commerce, and is as necessary for the proper maintenance of the tracks and roadbed as renewing the tracks. The work of which the plaintiff's was a part, was the repair of the roadbed by replacing old rails with new ones. This included removing old rails and installing new ones. The work of removing old rails was not complete when they were lifted from their place upon the ties and tossed upon the roadbed, but was complete only when they were carried away from the place where they lay between the tracks."

If the substitution of a heavy rail for a light one, of a new rail for an old one, brings an employee engaged in that work within the terms of the act, and if the work preliminary to the actual laying of the rails and the taking and carrying them away is such as brings him within the act, then why is not the replacement of a wooden bridge by a new bridge or a dirt fill of such character that an employee engaged therein is within the terms of the act, and especially in a case like this where there is no change of route, where the bridge or trestle is used continuously in interstate commerce and the replacement is continued and carried on during such act?



It has been held that an employe engaged in substituting a new bridge for an old one is within the terms of the act.

*Cincinnati N. O. & T. P. R. Co. v. Hall*, 243 Fed. 76.

We respectfully urge that the decision of the Supreme Court of Idaho in this case is contrary to the rules which have been announced by this court and is a misinterpretation of the Federal Employers' Liability Act.

### III.

A WRIT OF CERTIORARI SHOULD BE GRANTED BECAUSE OF CONFLICT OF DECISIONS BETWEEN THE CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT AND THE CIRCUIT COURT OF APPEALS FOR THE FOURTH CIRCUIT AND THE DECISION OF THE SUPREME COURT OF IDAHO IN THIS CASE.

There is a conflict of decision between the Circuit Court of Appeals for the Sixth Circuit in

*Cincinnati N. O. & T. P. R. Co. v. Hall*, 243 Fed. 76

and the decision of the Supreme Court of Idaho in this case. The case in the Circuit Court of Appeals



for the Sixth Circuit seems to be directly in point and directly in conflict with the Idaho decision. The facts there were substantially as follows:

Preparatory to the substitution of a new bridge for an old one over Sody creek in Tennessee, on the main line of the defendant's road, the defendant caused a cut to be made in the fill approaching the bridge and immediately next to a stone abutment at the south end of the bridge. The cut was to make a place for a wooden bent, which with another on the north side of the abutment, was to hold up the track and bridge while the abutment was removed and other permanent structure built in its place.

Hood, an employe, was with others engaged on the cut. As the work proceeded, the face of the fill was shored up, planks being placed upright against the face of the cut braced by crosspieces running from the face of the planks to the face of the abutment.

To the end that traffic might not be interrupted, strong stringers were placed under the ties to hold up the tracks, the ends on one side resting on the abutment and on the other on the roadbed itself, or upon a heavy cross sill. The fill was composed of

sand and some clay mingled with rocks and boulders. Trains passed over from time to time.

Hood was working under the tracks when the fill caved in, and was fatally hurt. In the course of the opinion, the court says, citing

*Pedersen v. D. & L. W. R. Co.*, 229 U. S. 146

"The interstate character of Hood's service is by the agreement admitted; but, since such admission of matter of law may not be conclusive of the court's duty to inquire into its jurisdiction, it may be said the facts bring the case within the act without any doubt."

No distinction can be drawn between the work in which Hood was employed and the work in which petitioner was employed in this case. In each case the object of the work was to replace a bridge. In both cases the employe was engaged in work designed to prevent the interruption of traffic during the replacement of the bridges.

We also urge that there is a conflict of decision between the Circuit Court of Appeals for the Fourth Circuit in

*Southern Ry. Co. v. M'Guin*, 240 Fed. 649

and the decision of the Supreme Court of Idaho in this case. In the case in the 240 Fed, the Circuit Court of Appeals for the Fourth Circuit held that

a sectionman engaged in assisting a railroad surveyor in a survey made to improve a curve in a track used in interstate commerce is employed in interstate commerce within the meaning of the Federal Employers' Liability Act. A few minutes before the deceased was killed, the surveyor had sent him to a designated point to hold a rod by means of which he intended to take a back sight. He was struck by a train and killed. The surveyor completed the work by placing the stakes, but the change in the track was never made. The defendant was a carrier of both interstate and intrastate commerce. The court said:

"The case of *Pedersen v. Delaware, etc. R. Co.*, 229 U. S. 146, 33 Sup. Ct. 648, 57 L. Ed. 1125, Ann. Cas. 1914C; 154, seems conclusive on the first point. It was there held that the work of keeping in repair the track, roadbed and other instrumentalities of a railroad engaged in interstate commerce is so closely related to interstate commerce as to be in practice and in legal contemplation a part of it. The work held to be a part of interstate commerce was the carrying of bolts or rivets to be used in taking out an old girder of a bridge and putting in a new one. Here the work was surveying and marking the changes to be made in the position of the cross-ties and rails, so as to make a better curve. No distinction can be founded on the failure of the railroad to complete the work by actually making the changes contemplated. Making the survey was as much a part of the work as laying the

rails according to the survey. *The numerous cases in which the work was on things which had not at the time become instrumentalities of interstate commerce obviously have no application.*" (Italics are ours)

A writ of *certiorari* was denied in this case, 244 U. S. 654.

Petitioner respectfully, therefore, submits that a writ of *certiorari* ought to issue,

*First*, in the interest of jurisprudence and uniformity and harmony of decision between this court and the Supreme Court of Idaho in respect of the questions above indicated;

*Second*, because, as has been decided by this court in

*Forsyth v. Hammond*, 166 U. S. 506

this court will grant a writ of *certiorari* in a case where there is an important conflict of opinion between a state supreme court and a Circuit Court of Appeals.

*Third*, because the replacement of trestles and bridges without interruption of traffic and the performance of the work in such manner as not to imperil interstate commerce is a duty which railroads are required to meet every day. Whether employees

engaged in such work are within the Federal Employers' Liability Act is a question which will continually arise, and this court should place the stamp of finality upon the status of such employment.

*Fourth*, because the determination of this question is not important alone to the petitioner, but it is important because there should be a uniformity in the interpretation and the construction of the act under circumstances which will constantly be recurring.

Respectfully submitted,

JOHN P. GRAY,

Coeur d'Alene, Idaho.

*Attorney for Petitioner.*

IN THE SUPREME COURT OF THE  
UNITED STATES.

WILLIAM KINZELL, *Petitioner,*

v.

CHICAGO, MILWAUKEE & ST. PAUL RAIL-  
WAY, COMPANY, a corporation,

*Respondent.*

NOTICE.

TO ROBERT H. ELDER, ESQ.,

*Counsel for Respondent.*

Sir:

Please take notice that on Monday, the-----  
day of-----, 1918, upon the opening  
of the court, or as soon thereafter as counsel can be  
heard, the foregoing petition and brief, together with  
a certified copy of the entire transcript of the re-  
cord in the case, will be presented and submitted to  
the Supreme Court of the United States, in its court-  
room in the Capitol, at Washington, D. C., in pursu-  
ance of its rules, in such cases made and provided.

Dated this-----day of May, 1918.

JOHN P. GRAY,

*Of Counsel for Petitioner.*

IN THE  
SUPREME COURT OF THE UNITED STATES

---

WILLIAM KINZELL,

*Petitioner,*

Against

CHICAGO, MILWAUKEE & ST. PAUL  
RAILWAY COMPANY, a corpora-  
tion,

*Respondent.*

---

ON PETITION FOR A WRIT OF CERTIORARI TO  
THE SUPREME COURT OF IDAHO.

---

BRIEF OF RESPONDENT IN OPPOSITION TO  
PETITION FOR WRIT

---

HEMAN H. FIELD,

GEORGE W. KORTE,

*Counsel for Respondent.*



# CASES CITED:

	Pages
Atlantic Coast Line Ry. v. Tredway, 245 U. S., 670.....	9
Baltimore & Ohio RR. Co. v. Whitacre, 242 U. S., 169.....	9
Bravis v. Chicago, Milwaukee & St. Paul Ry. Co., 217 Fed. Rep., 234.....	13-18
Chicago Junction Ry. Co. v. King, 222 U. S. 222.....	9
Chicago, Burlington & Quincy RR. o. v. Harrington, 241 U. S., 177, 180.....	13
Chicago & Erie RR. Co. v. Steele, 183 Ind., 444.....	15
Cincinnati, New Orleans & Texas Pacific Ry. Co. v. Hall, 243 Fed. Rep., 76.....	16
Columbia & Puget Sound RR. Co. v. Santer, 223 Fed. Rep., 604.....	17
Dickinson, Receiver, v. Industrial Board, 280 Ill., 342.....	15
Erie Ry. Co. v. Welsh, 242 U. S., 303.....	11
First Employers Liability Cases, 207 U. S. 463.....	10
Great Northern Ry. Co. v. Alexander, 246 U. S., 276.....	8
Great Northern Ry. Co. v. Knapp, 240 U. S. 464, 466.....	9
Great Northern Ry. Co. v. Donaldson, 246 U. S., 121.....	9
Louisville & Nashville RR. Co. v. Parker, 242 U. S., 13.....	12-18
Maricopa & Phoenix Ry. v. Arizona, 156 U. S., 347, 352.....	2
Minneapolis & St. Louis RR. Co. v. Nash, 242 U. S., 619	12
N. Y. Central & Hudson River RR. Co. v. Carr, 238 U. S., 260.....	11
N. Y. Central RR. Co. v. White, 243 U. S., 188.....	13
Parmelee v. Chicago, Milwaukee & St. Paul Ry. Co., 246 U. S., 658.....	9
Pederson v. Delaware, Lackawanna & Western RR. Co., 229 U. S., 146, 152.....	13-16
Raymond v. Ry. Co., 243 U. S., 43.....	5-12-13-18
Seaboard Airline Ry. Co. v. Koennecke, 239 U. S., 352, 355.....	8-9
Seaboard Airline Ry. Co. v. Padgett, 236 U. S., 668.....	9
Southern Ry. Co. v. McGuin, 244 U. S., 654.....	8-17
Sanner v. Western Maryland Ry. Co., 245 U. S., 661.....	9
Shanks v. Delaware & Lackawanna Ry. Co., 239 U. S., 556.....	10
Washington Session Laws, 1911, Chap. 74.....	4

IN THE  
**SUPREME COURT OF THE UNITED STATES**

---

WILLIAM KINZELL,

*Petitioner,*

Against

CHICAGO, MILWAUKEE & ST. PAUL  
RAILWAY COMPANY, a corpora-  
tion,

*Respondent.*

---

ON PETITION FOR A WRIT OF CERTIORARI TO  
THE SUPREME COURT OF IDAHO.

---

**BRIEF OF RESPONDENT IN OPPOSITION TO  
PETITION FOR WRIT**

---

OBJECTIONS TO PETITION.

The respondent, Chicago, Milwaukee & St. Paul Railway Company, prays that the application for writ of certiorari to the Supreme Court of Idaho be denied, because:

(a) The action is based upon the Federal Employers' Liability Act and seeks judgment for damages through the negligence of the respondent. The case is one in which there is no question as to the interpretation of any provisions of the federal act, or as to the definition of legal principles in its application, but simply involves an appreciation of all the facts for the purpose of determining whether there were matters for the consideration of the jury.

(b) The decision of the Idaho Supreme Court rests upon findings of fact, legitimate inferences and conclusions drawn from certain contested facts and the appreciation of the facts introduced in evidence which are final so far as this court is concerned.

(c) There is no substance in petitioner's claim of the denial of federal right, as no federal right was denied the petitioner at any stage of the proceedings in the state court, and this court is without jurisdiction to review the decision of the Supreme Court of Idaho.

(d) The right to apply for the discretionary writ has been waived by the failure of the petitioner to make use of and exhaust his whole remedy to correct the errors complained of, granted to him by the rules of practice and procedure in force before the State Supreme Court at the time the findings were made. (Supreme court rule 57; see appendix, page 20; *Maricopa & Phoenix Ry. vs. Arizona*, 156 U. S. 347, 352).

(e) The petitioner has not furnished a printed record, as required by the rules of this court, in that all the exhibits (Exhibits 5, 6 and 13) material to this application have been omitted and we have no way of bringing them to the attention of the court, except by reference to the original exhibits.

---

### STATEMENT

The accident to the petitioner happened in the State of Washington. He was a member of a construction crew operating wholly within that state and he had no connection whatever with the maintenance of the road-bed or with the operation or movement of commerce

over the road. The original work carried on by this crew consisted in excavating for an independent line change near the station of Lone Pine, Washington (*Record*, 189; *Exhibit* 5.) Incidental to this work and because it was more economical in the long run, the material was wasted by dumping it under the wooden bridges in question and fell far short of filling the opening or space spanned by them (*Record*, 189). The material was not put there to strengthen the bridges (*Record*, 191); they were independent and were in as good condition as when built; the bridge engineer estimated the life of the timbers in the trestles to be about two years, and said that no changes would have to be made or repair work done on them before that time (*Record*, 193).

It was the judgment of the respondent that it would be more economical to make use of the material than to waste it to the side of the right of way where the excavation work was being carried on (*Record*, 189). It had along its right of way several wooden trestles which were subject to the hazards of fire and decay and were a constant menace to the lives and property which moved over them. The respondent determined that from the material so excavated, solid embankments should be built, either under or to the side of the wooden trestles, and that, when completed, the wooden trestles should be abandoned. It was a matter of improvement and nothing more, and may be likened to the building of a tunnel (234 U. S. 43) to do away with the hazards of slides, snow blockades and heavy grades, or, to the grading of a cut-off (217 Fed. Rep. 234) to avoid the hazards of operating trains over sharp curves, or, to the construction of an elevated track and

the abandonment of the surface grade to avoid the many hazards at street and highway crossings.

With the Lone Pine work out of the way, this same construction crew was moved to Ewan, Washington, where certain excavation work had to be done in advance of building new sidetracks, stockyards and other station facilities. For the same reason and for the same purpose and as an incident thereto, the material from this work was likewise moved and dumped under the two trestles (*Record*, 189, 190; *Exhibit 6*). There was more than enough material in this work to complete the two embankments commenced with the material taken from the Lone Pine work. After the embankments had sufficiently settled and conditioned themselves for use, the interstate track upon the trestles was first interfered with; the rails, the ties and the decks were torn up and removed and new ties and rails were laid upon the embankments; the wooden trestles were then abandoned and no future use made of them (*Record*, 188, 191). The embankments were not completed or used when petitioner met with his injury (*Record*, 190).

The whole work and the men employed were embraced within the Washington State Compensation Act, which makes provision for the satisfaction of all personal injuries received in the course of the work (*Washington Session Laws*, 1911, Chap. 74). The respondent was complying with that act and had paid to the State of Washington all the premiums and sums levied against it by the State of Washington, for personal injuries occurring on such work. The only relief afforded petitioner was under the local law in accord-

ance with its provisions, as pointed out in the case of *Raymond vs. Chicago, Milwaukee & St. Paul Ry. Co.*, 243 U. S. 43. That law took away from the courts of the State of Washington all right to review a suit for personal injury; and so this case was dragged into the courts of Idaho to avoid the Washington law, by the pretended plea that the work of excavation and construction of the embankments was the repair of the bridges, a *necessary* incident to the movement of interstate commerce, and the plaintiff a federal, instead of a state, employee (*Record*, 3, 4). Issue was joined on these questions of fact (*Record* 12, 13); a trial was had and the dispute was sent to the jury under a meaningless and misleading instruction (*Record*, 66, 67), although we had offered one based upon the facts involved (*Record*, 68, 69). Inflamed by the indecent demonstration (*Record*, 281) and the juggling experiments (*Record*, 279) ordered under stress of objections (*Record*, 272, 281), the jury returned a verdict for \$35,000 in the face of the almost conclusive showing made by respondent that the petitioner was faking nine-tenths of his claimed injuries. The motion for a new trial (*Record*, 57) was ignored (*Record*, 75) and judgment for the full amount of the verdict was entered (*Record*, 19).

On appeal, the Supreme Court of Idaho reversed the outrageous judgment and ordered the case dismissed. In doing so, it considered only the dispute involving whether petitioner was embraced within the Washington State Compensation Act, or whether the Federal Employers' Liability Act should control. The court reserved all consideration of the many other assignments of error with the statement in the opinion that they

were "worthy of careful consideration" (*Opinion, Record, 294.*) In determining the dispute the Supreme Court, upon a review of all the evidence, found (*Opinion, Record, 294*) that the work of excavation at Ewan and Lone Pine was not repair work; that the bridges were in no state of disrepair; that it was new work in advance of construction, and that the use made of the material to construct the embankments under the bridges, in the very nature of things, could not be repair work, but work of construction and substitution; that the substitution did not occur until sometime after the embankment had settled and was in condition to receive the ties and rails upon which the trains moving commerce would be operated (*Record, 190*); that, so far as interstate commerce was concerned, it was a matter of indifference that the embankments were being built.

The opinion of the Supreme court recites the specific findings of fact (*Record, 294*):

"The injuries complained of were received in the State of Washington while appellant was engaged in constructing a dirt fill beneath a wooden trestle known as Bridge 140, near the town of Ewan, Washington, which fill was intended eventually to support the track. The material with which the fill was being constructed was obtained from new construction work entirely within the State of Washington, and no question of interstate commerce was thereby involved. The fill had progressed to the extent that it had in places reached the railroad ties and it had become necessary, after dumping the cars of dirt, to use what is known as a 'bull-doser' to spread the dirt away from the track and thereby widen the fill. The 'bull-doser' employed in this case was a flat car with adjustable wings extending on either side from a point slightly over each rail and spreading out toward the back of the car.



The principal duty of respondent (Kinzell) was to adjust these wings, and, at times when they were waiting for another trainload of dirt, he and Hiram Lee, another employe upon the doser, used shovels to clean out the rocks that lodged between the tracks. The dirt was being brought to the fill by means of two trains of about 25 'air dump' cars each. When the train approached the bridge it would couple on to the doser and proceed to the place where the dirt was to be dumped. After dumping the dirt, the cars would be righted and the train would start back, pulling the doser after it. The wings of the doser would level down the dirt dump, spreading it away from the track, and thus widen the fill.

It is suggested that the material composing the fill necessarily added support to the trestle in the course of the construction thereof. This is an inference which does not follow from the testimony in the case, but, if it were true, it is but an incident to the work of making the fill and not a purpose in view in its construction. It is true, one of the duties of the respondent was to remove dirt and rocks from the track, which lodged thereon when the cars were dumped, and which might, if allowed to accumulate, interfere with interstate commerce. This, however, was but an incident to the work of constructing the fill and did not change the character of the employment. The object of the work, as pointed out in the *Parker* case, is controlling."

The Court's conclusions find full support in the testimony of the superintendent and trainmaster of the respondent (*Record*, 188, 191), its engineer in charge of bridges and building (*Record*, 193, 194), in Kinzell's own admissions (*Record*, 87, 103, 104, 110, 111) and the Exhibits 5 and 6. The court was unanimous in its findings upon the facts involved. It resolved the dispute in favor of the respondent. These findings, so far as this court is concerned, are final.

## BRIEF OF ARGUMENT.

**The claim of federal right, upon which jurisdiction to review is asked, is wanting in substance.**

An examination of the record shows that no construction of the Federal Employers Liability Act is involved. It is the settled rule of this court that when the question presented involves the findings of fact and the conclusions of the appellate state court upon the sufficiency of the evidence for the purpose of deciding whether there was evidence that the plaintiff was employed in interstate commerce, whether the defendant was negligent, or whether there was a jury question upon such matters, the application for writ of certiorari or other review will be denied.

*See R.R. Co. vs. Welch, 242 U.S. 313, 318.*  
In *Seaboard Air Line Ry. vs. Koennecke*, 239 U. S., 352, 355, it was claimed that there was no evidence that deceased was employed in interstate commerce, and this court said that "upon such matters, as upon questions of negligence and the like, brought here only because arising in actions on the statute and involving no new principle, we confine ourselves to a summary statement of results."

An examination of the petition for writ of certiorari, in *Southern Ry. Co. vs. McGuin*, 244 U. S., 654, will disclose that the questions upon which the application for the writ was based depended upon disputed facts, the sufficiency of the evidence and the findings of the lower court as to employment in interstate commerce, negligence and assumption of risk.

In *Great Northern Ry. Co. vs. Alexander*, 246 U. S., 276, the action was founded upon the federal act; jurisdiction to review the decision of the state supreme court

was denied because the claim of federal right of removal was too frivolous and wanting in substance.

For like reasons the application for writ of certiorari was denied the petitioner in the case of *Sanner vs. Western Maryland Ry. Co.*, 245 U. S., 661, where recovery was dependent upon the Federal Employers Liability Act.

Whether plaintiff was within the federal act, was involved in *Guy vs. Cincinnati Northern Ry. Co.*, 246 U. S. 668, and the right to the writ of certiorari was refused.

The application for writ of certiorari was denied the petitioner in the case of *Atlantic Coast Line Ry. vs. Tredway*, 245 U. S., 670.

In *Parmelee vs. Chicago, Milwaukee & St. Paul Railway*, 246 U. S., 658, the right to review was denied because the matters contained in the application for a review involved only an appreciation of the facts and the inferences to be derived therefrom. That case was affirmed without opinion and upon the authority of *Chicago Junction Ry. Co. vs. King*, 222 U. S., 222; *Seaboard Air Line Ry. Co. vs. Padgett*, 236 U. S., 668, 673; *Seaboard Air Line Ry. Co. vs. Koennecke*, 239 U. S., 352, 355; *Great Northern Ry. Co. vs. Knapp*, 240 U. S., 464, 466; *Baltimore & Ohio Railroad Co. vs. Whitacre*, 242 U. S., 169; *Gt. Northern Ry. Co. vs. Donaldson*, 246 U. S., 121.

---

The construction of better or improved instrumentalities as substitutes for those in use, whether it be bridges, tracks or rolling stock, is not a necessary incident to interstate transportation.

The decision of the Idaho Supreme Court based up-

on its findings of fact is not in doubt, and, so far as the law is concerned, it needs no help on our part to sustain it. We cannot, by reviewing the extravagant notions of counsel for petitioner, make the opinion any plainer or more conclusive. It is manifest, from a reading of the opinion, that the Court has understood the facts and the decisions of this court which have dealt with the federal act. The opinion is supported by the cases which have come before this court, wherein the division line has been drawn between the employe belonging to the state and the employe controlled by the federal government. That a line must be drawn somewhere is certain, ever since the opinion in the 1st *Employers Liability Cases*, 207 U. S., 463. The states cannot be deprived of jurisdiction over those employes who have no immediate connection with the movement of interstate commerce and who have only to do with the work of constructing the things which might or might not be used as instruments in interstate commerce. The work performed in advance of their substitution and use by the railroad company has no relation to interstate transportation, and, therefore, employes connected with such work are subject to state control and must seek relief under the state compensation acts in those states where such laws have been enacted.

This court has often, and in different ways, stated the test to be applied in staking out the division line between a state and federal employe.

In *Shanks vs. Delaware & Lackawanna Ry. Co.*, 239 U. S., 556, it is significantly said that the act "speaks of interstate commerce not in a technical sense, but in a practical one better suited to the occasion." By this is meant that unless a practical view is taken of the

statute, it might include all the employes of an interstate railroad, whether or not they were necessarily connected with the movement of interstate commerce.

In *N. Y. Central Ry. vs. Carr*, 238 U. S., 260, it is mentioned that the work of the employe must be so directly and immediately connected with the movement of interstate commerce as "substantially to form a necessary incident thereof." The court's opinion is properly reflected in the use of the words "a *necessary* incident." A mere incident of a condition is one thing, a *necessary* incident is another. The distinction is important. The work of dumping excavation material under a wooden bridge, which, at some time in the future, but not before two years, might need repairs, may be an incident of the repairing, but it certainly is not a *necessary* incident; this, for the self-evident reason that the bridge is complete, in no state of disrepair; while the work of dumping is going on transportation of freight and passenger cars proceed thereon, and the business of interstate commerce is carried on without interference or interruption so far as the wooden bridge is concerned. That bridge is still an instrument of interstate commerce; the incomplete fill is not; and, until the bridge is abandoned and the embankment is used in its place, it remains an integral part of the railway track. The particular facts in the *Carr* case will demonstrate the force and effect of what is a *necessary* incident to the movement of interstate commerce in the opinion of this court.

The test in the *Carr* case, *supra*, was repeated in *Erie Ry. Co. vs. Welsh*, 242 U. S.. There it was held that whether the employe was performing an act so di-

rectly and immediately connected with interstate transportation "as to be a part of it or a *necessary* incident thereto, \* \* \* depends upon whether the series of acts that he had last performed was properly to be regarded as a succession of separate tasks or as a separate and indivisible task" (*italics added*).

In *Louisville & Nashville Ry. Co. vs. Parker*, 242 U. S., 13, it is said that the purpose or object of the work, and not the incidental acts connected with the real work being done, must control.

And so this court, in the case of *Raymond vs. Chicago, Milwaukee & St. Paul Ry. Co.*, 243 U. S., 43,—which dealt with construction, substitution and improvement of railroad instrumentalities—said that "whatever doubt may have existed in the minds of some at the time the judgment below was rendered, under the facts as alleged, Raymond and the Railway Company were not engaged in interstate commerce." In that case, counsel for Raymond, as at bar, made the claim that, because the tunnel was an improvement over the surface grade for which it would be substituted, the work of boring the tunnel was, therefore, repair work, in that it would take the place of a railroad track which *some-time* would need repair or be worn out. Now, Raymond was doing work no different than that which the petitioner was doing; both were building a thing which, when finished, would take the place of another thing then used to move interstate commerce.

The like impractical notion was put forward in *Minneapolis & St. Louis Ry. Co. vs. Nash*, 242 U. S., 619; but the insistence was too frivolous to call for hearing or opinion. There, Nash, a member of a bridge crew,

was hurt while helping to bring a ready-made out-house from the shops to one of the stations along the line where it would have been installed as a substitute for an old one. The Minnesota court thought the work of carting the out-house from the shops to its final destination made such work a necessary incident to the movement of interstate commerce. It must be noticed that Nash was one step nearer to the division line than the work being done by the petitioner at bar, in that the out-house was finished and the embankment was not; the out-house was being brought to the place where it would be immediately substituted, while the embankment could not be substituted until it had settled, the deck and rails from the bridge destroyed and new ties and rails laid thereon, which last work was not done until long after the petitioner was hurt.

In *New York Central Ry. Co. vs. White*, 243 U. S., 188, a new station and new tracks were being constructed. White was hurt while guarding the tools used in doing the work. It is stated in the opinion that White's work "bore no direct relation to interstate transportation and had to do solely with construction work which is clearly distinguishable, as pointed out in *Pedersen vs. Delaware & Lackawanna Ry. Co.*, 229 U. S., 146, 162. And see, *Chicago, Burlington & Quincy R. R. Co., vs. Harrington*, 241 U. S., 177, 180. *Raymond vs. Chicago, Milwaukee & St. Paul Ry. Co.*, this day decided, *ante*, 43. This point, therefore, is without basis in fact."

The Eighth Circuit Court had before it just such a question as is raised here in the case of *Bravis vs. Chicago, Milwaukee & St. Paul Ry. Co.*, 217 Fed. Rep., 234. Bravis was hurt while on his way home from the work



of constructing a bridge on a short cut-off which, when completed, would take the place of the main line then used in interstate commerce. He used a hand-car to go to his home and operated it on the main track. On his way he met a through train, and, before he could get his car off the track, a collision occurred. As in this case, it was maintained:—(a) That the work of building the cut-off was a necessary incident to the movement of interstate commerce, and, (b) That, in any event, the work of Bravis in removing the hand-car from the track aided interstate commerce.

The first claim was disposed of summarily, and the second was put aside by the statement that “Bravis bore the same relation to the defendant while he was on the hand-car that he would have borne to it if he had walked on the railway track with its permission and at his own risk on his way to and from his work.”

The only difference between the work which Bravis was doing and that at bar is the distance in territory; the bridge upon which Bravis worked was off to one side, while the embankment in question, fortuitously, was being built immediately under the interstate track; but territorial limits cannot change the work of construction to that of repair. The question at bar might readily be solved by counsel for petitioner, if he would shut his eyes and imagine the embankment being built 100 feet from the bridge instead of under it. Again there is no difference in the claim made by Bravis and the petitioner in respect to the use of the track. Bravis maintained that unless he got the hand-car out of the way a wreck would occur, while petitioner claims that if he failed to remove the rocks or other particles left behind after the bull-doser had been used, a wreck

would also occur. That might be true if either Bravis or the petitioner failed to get out of the way of the train; but such incident cannot change the nature and purpose of the work which was being done.

The various state appellate courts seem to have no difficulty in understanding the purpose and intent of the federal act, and they are in harmony with the Idaho Supreme Court.

The Indiana Supreme Court, in the case of *Chicago & Erie R. R. Co. vs. Steele*, 183 Ind., 444, had before it an employe who was distributing ties along the right of way, for use in constructing a double or second track. The main line track was used by the work train upon which to dump the ties for distribution. Giving the statute a practical test, it ruled that such work was new construction and that it could not change the nature of the work because a tie fell upon the interstate track and was picked up by the employe and thrown to one side.

The Illinois Supreme Court, in the case of *Dickinson, Receiver, vs. Industrial Board*, 280 Ill., 342, found that the construction work carried on by the railroads in Chicago in the course of elevating their tracks above the surface grade, was new work in that "it was a matter of indifference, so far as interstate commerce in which the railroad was engaged was concerned, although the structure to be erected might be an instrument of such commerce."

In that case retaining walls were being built, into which earth material would be dumped so as to make a solid embankment which would be substituted for the

track then in use. We can see no difference between the substitute being built and the embankment in question.

---

The plea that the writ should issue because there is a conflict of decisions between the Supreme Court of Idaho and the Sixth Circuit Court of Appeal, is specious; no such conflict exists. The case from the Sixth Circuit which is claimed to be in conflict, is that of *Cincinnati, New Orleans & Texas Pacific Ry. Co., vs. Hall*, 243 Fed. Rep., 76. There an old bridge was in a state of disrepair and a new one was ordered to be immediately built in its place. The main track over which commerce moved was being interfered with by raising it high enough so that the timbers of the new one could be inserted in the place of the old ones,—work identical with that done in *Pedersen's* case, 229 U. S., 146, or work like that done in connection with the bridge in question after the embankment had settled and the tearing up of the deck and the rails and ties of the bridge and the laying of the new rails and ties upon the embankment occurred (*Record*, 190). The facts recited in the opinion in the *Hall* case (page 77) are:

“Preparatory to the substitution of a new bridge for an old one, the defendant caused a cut to be made in the fill approaching the bridge and next to a stone abutment. The cut was to make a place for a wooden bent, which, with another on the north side of the abutment, was to hold up the track and bridge while the abutment was removed and another permanent structure built in its place. To the end that traffic might not be interrupted, strong stringers were introduced under the ties to hold up the tracks; the ends on one side resting on the abutment and the other on the roadbed itself. Whether the ends of the stringers rested on a sill

or on top of the fill, the ties must have been lifted out of their positions in the slag, thus leaving depressions and heavy ridges in the slag."

The court was of the opinion that the removal of the old abutment and the construction of a new one in its place was not different from the taking out of the old bent and inserting the new one in *Pedersen's* case, 229 U. S., 146.

The other case mentioned as being opposed to the conclusions of the Idaho Supreme Court is that of *Southern Railway Co. vs. McGuin*, 240 Fed. Rep., 649 (C. C. A.), *certiorari denied* in 244 U. S., 653. That case well illustrates the necessity for some practical knowledge of railroading in order to view the statute in "a practical sense suited to the occasion." McGuin was a section hand, and, as stated in the opinion (240 Fed. Rep., at 650), "on the day, by direction of the track foreman, he was working with one Parati, a road engineer, who was surveying and setting stakes with the view of improving a curve by a slight change in the track. Parati completed the work by placing the stakes to guide the track men in changing the rails." It is manifest that the purpose of the work was the eventual repair of the main line track, and the act of the surveyor, in staking out the work, was a part thereof. No such work as that was going on in the case at bar; the fill in question had no relation to the movement of commerce until it was conditioned and put in use. So far as the movement of commerce is concerned, the fill might well have remained under the bridge unused until the bridge needed repair, or it may never have been used. It was a matter of indifference whether it would or would not be-

come an instrument in interstate commerce. So long as the wooden bridge had life and could be repaired, just so long would the fill be useless.

The case of *Columbia & Puget Sound R. R. Co. vs. Sauter*, 223 Fed. Rep., 604 (C. C. A.), mentioned in the brief, is not to the contrary. The Idaho Supreme Court correctly says of that case that "the main purpose of the work was directly connected with the transportation of interstate commerce." There a flood washed away the interstate track and the movement of all interstate trains was blocked until a temporary bridge could be built. The temporary bridge was being constructed when Sauter was hurt. The work would be no different than if the rails had been swept away and other rails were being laid. Such work, of course, is repair work, because commerce could not be transported until the work was done.

---

Finally, it is repeated here that the petitioner's work "in keeping the track clear of material which was dumped upon it was not a matter of indifference," and, if he failed to perform it well, a wreck might be caused, and that, therefore, he was doing something incidental to interstate commerce.

As pointed out in the *Carr* case, *supra*, such act was an incident, but not a *necessary* incident, to interstate transportation. It cannot change the purpose of the work, as pointed out in *Louisville & Nashville Ry. Co. vs. Parker*, 242 U. S., 13.

The fantastic contention was given no notice in *Raymond vs. Chicago, Milwaukee & St. Paul Ry. Co.*, 243 U. S., 43, and is well disposed of in the opinion of

*Bravis vs. Chicago, Milwaukee & St. Paul Ry. Co.*, 217 Fed. Rep., 234.

As well might petitioner claim that unless the bulldozer or the work train, or he himself, failed to get out of the way, a wreck was possible and interstate commerce would be affected. The real work carried on was the excavation for side tracks and stock yards at Ewan and the incidental deposit of the excavation material under the bridge in question for future use. The temporary use of the main line track upon which to deposit the dirt while being dumped below, cannot change the character of the work carried on at Ewan or the economical use made of the material in building the independent embankment.

The opinions of this court have so often laid aside the questions upon which the request for the discretionary writ of certiorari is asked, that there is no new principle involved and the findings and conclusions of the Idaho Supreme Court are final; therefore, the application for the writ should be denied.

Respectfully submitted,

*Amos H Field*  
*George W Korte*  
Counsel for Respondent.

## APPENDIX.

IN THE  
**SUPREME COURT OF THE STATE OF IDAHO**

---



---

WILLIAM KINZELL,

*Respondent,*

vs.

CHICAGO, MILWAUKEE & ST. PAUL  
 RAILWAY COMPANY, a corpora-  
 tion,

*Appellant.*

No. 3035

---



---

I, *I. W. HART*, Clerk of the Supreme Court of the State of Idaho, do hereby certify that in the above entitled cause the decision of said court was filed and final judgment entered on the 26th day of March, 1918, and that no application for a rehearing of said cause has been made or filed by the respondent William Kinzell or by his counsel in said supreme court of the State of Idaho.

WITNESS my hand and the Seal of the Court, this 31st day of July 1918.

(Seal)

I. W. HART, Clerk.

---

“RULE 57. *Rehearing.* All applications for rehearing shall be upon petition, printed or typewritten, in the manner prescribed for briefs filed by counsel, setting forth wherein it is claimed that the court has erred. Such petition shall be presented within twenty days from the date judgment or order of the court is filed. Counsel may accompany the petition with a brief of the authorities upon which they rely in support thereof, but no oral argument will be heard thereon. With the petition the applicant shall file three printed or type-



written copies thereof for the use of the justices of the court, in addition to the original, and shall make the deposit with the clerk as prescribed by Rule 38. Counsel shall serve copy of such petition and brief upon the adverse party, but the adverse party shall not answer such petition or brief unless requested to do so by the court."

"RULE 38. *Filing Fees.* \* \* \* Petitions for rehearing shall be accompanied by a filing fee of \$5."

IN THE SUPREME COURT OF THE STATE OF  
IDAHO,

Clerk's Office.

I, I. W. HART, Clerk of the Supreme Court of the State of Idaho, do hereby certify that the above and foregoing printed rules numbered one to seventy-two (1 to 72) inclusive, comprise all the rules of practice of said court in force since the 10th day of February, 1918, and in force on the date of this certificate.

WITNESS my hand and the seal of the court this 31st day of July, 1918.

(L. S.)

(Signed) I. W. HART, Clerk.

IN THE  
**SUPREME COURT OF THE STATE OF IDAHO**

WILLIAM KINZELL,	}	No. _____
<i>Respondent,</i>		
vs.		
CHICAGO, MILWAUKEE & ST. PAUL RAILWAY COMPANY, a corporation,		
<i>Appellant.</i>		

The respondent being about to apply through the Supreme Court of the United States for a writ of certiorari, it is *ordered* that the remittitur in this case be stayed until the determination of said application.

ALFRED BUDGE,  
*Chief Justice.*

Dated May 13, 1918.

I, I. W. Hart, Clerk of the Supreme Court of the State of Idaho, do hereby certify that the preceding and annexed contains a true and correct copy of the original Order staying Remittitur in the above entitled cause, on the 13th day of May, 1918, and now on file in my office.

Witness my hand and the seal of the Court this 29th day of August, 1918.

I. W. HART, *Clerk.*

(Seal of Supreme)  
( Court of Idaho )

# Shipping Contract

SHIPPED

## North America

DETROIT, MICH. 1910

NOV. 1910

WILLIAM KINZEL

Chicago

CHICAGO, MILWAUKEE & ST. PAUL RAILWAY COMPANY  
INCORPORATED

Chicago

WILLIAM KINZEL, JR.  
CHICAGO, ILL.

WILLIAM KINZEL, JR.

CHICAGO

CHICAGO

CHICAGO

## INDEX.

	Pages.
Statement of Facts.....	1
Character of Petitioner's Employment.....	2
Specification of Errors.....	9
Argument .....	9
Interstate Character of Petitioner's Employment....	10
Criticism of Decision of Idaho Supreme Court .....	16, 22, 24
Replacement of Instrumentalities Used in Inter- state Commerce .....	20
Scope of Review by this Court.....	26
Negligence of Respondent.....	28
Contributory Negligence .....	33
Assumption of Risk.....	34
Measure of Damages.....	37
Amount of Recovery.....	38
Instructions .....	38

## INDEX OF CITATIONS.

### CASES CITED.

	Pages.
Chesapaeke & O. R. Co. v. Kelly, 241 U. S. 485.....	37
Chesapeake & O. R. Co. v. De Atley, 241 U. S. 310.....	35
Cincinnati N. O. & T. P. R. Co. v. Hall, 243 Fed. 76.....	22
Coal & Coke R. Co. v. Deal, 231 Fed. 604.....	25
Columbia & P. S. R. Co. v. Sauter, 223 Fed. 604.....	11, 12
Dickinson v. Industrial Board, 280 Ill. 342.....	17, 19
Delaware L. & W. Co. v. Yurkonis, 238 U. S. 439.....	15
Denver & R. G. Co. v. Wilson, 163 Pac. 857.....	11
Hamilton-Brown S. Co. v. Wolf B. & Co., 240 U. S. 251..	26
Lombardo v. Boston & M. R. Co., 223 Fed. 427.....	11
Louisville & N. R. Co. v. Holloway, 246 U. S. 525.....	37, 38
Montgomery v. Gray, 26 Ida. 583.....	28
Pedersen v. D. L. & W. R. Co., 229 U. S. 146.....	10, 20, 23
Panama R. Co. v. Napier S. Co., 166 U. S. 280.....	26
Philadelphia B. & W. R. Co. v. McConnell, 228 Fed. 263 .....	11, 21
Raymond v. C. M. & St. P. R. Co., 243 U. S. 43.....	15, 16
Southern Ry. Co. v. Puckett, 244 U. S. 571.....	11, 12
Southern Ry. Co. v. McGuin, 240 Fed. 649.....	24
San Pedro L. A. & S. L. R. Co. v. Davide, 210 Fed. 870..	14
Shanks vs. D. L. & W. R. Co., 239 U. S. 556.....	15
Smiley v. Kansas, 196 U. S. 447.....	28
Southern Ry. Co. v. Bennett, 233 U. S. 80.....	38
Thompson v. Columbia & P. S. R. Co., 205 Fed. 203....	11
United States v. C. M. & St. P. R. Co., 219 Fed. 632.....	17

### CITATION OF STATUTES.

Employers' Liability Act.....	1
Hours of Service Act.....	17, 18
Judicial Code, Sec. 237.....	26

IN THE  
**Supreme Court**  
OF THE  
**United States.**

---

OCTOBER TERM, 1918  
No. 485

---

WILLIAM KINZELL,	<i>Petitioner,</i>
vs.	
CHICAGO, MILWAUKEE & ST. PAUL RAILWAY COMPANY, a corporation,	<i>Respondent.</i>

---

ON WRIT OF CERTIORARI TO THE SUPREME  
COURT OF THE STATE OF IDAHO.

---

**Brief of Petitioner.**

---

STATEMENT OF FACTS.

Petitioner brought this action in a state court of competent jurisdiction in Idaho to recover damages for personal injuries suffered while in the employ of respondent, basing his right of action solely upon the Federal Employers' Liability Act. From a judgment in favor of the employe an appeal was taken by the railway

company to the Supreme Court of Idaho, which court reversed the judgment upon the sole ground that the petitioner was not engaged in interstate commerce at the time of his injury. (Opinion Record, pp. 278-82.)

This court issued a writ of certiorari, and upon that writ the cause is here for determination.

#### CHARACTER OF PETITIONER'S EMPLOYMENT AT TIME OF INJURY.

At the time of the injury the railway company was engaged in operating a railroad extending from Chicago, Illinois, to Seattle, Washington, over which both interstate and intrastate commerce was daily transported.

Near Ewan, Washington, were two wooden bridges or trestles which were part of the main line of railroad of respondent and over which all of its trains were operated. The bridges or trestles had been constructed in 1908 at the time the railroad line was built. Some time prior to the day when plaintiff was injured, the railway company had commenced filling in the two bridges or trestles with earth and it was while engaged in such work and as a part thereof that petitioner was injured.

A brief reference to the testimony with respect to the character of this work and the exact duties of respondent seems essential.

Kinzell testified that the railway company's road master had stated to him that the bridges had to be filled in. (R., pp. 83-4.)

The assistant engineer of respondent, Pinson, testified he had made an inspection of the bridge where Kinzell was injured; knew its life and capacity; estimated it had a prospective life of two years at the time



of his last inspection in April, 1914; that the filling of the bridges was for the purpose of replacing them. (R., pp. 183-4.)

He testified as follows:

Q. When did you make this inspection?

A. In April, 1914.

Q. You said the bridge then had two years of life?

A. At least two years.

Q. You mean by that, after that time you would have to fill in there, or build a new bridge; is that the idea?

A. Probably at that time. (R., pp. 183-4.)

As the petitioner was injured in February, 1915, this bridge at the time of the injury had an estimated life of approximately one year. The respondent company recognized the necessity which it would soon be under of replacing in some way this old bridge.

Campbell, superintendent of respondent, having charge of the road work at the time petitioner was injured, testified that the work consisted of filling in the two bridges or trestles with an embankment which was intended to replace them, the material used being obtained from certain line changes and grade reductions. (R., p. 179.) At the time petitioner was injured, the filling in had not been completed and the rails and ties were resting upon the wooden bridge rather than upon the embankment; that the work was being prosecuted with a twofold purpose; that the railroad line, track and grade near Ewan was being altered and improved, necessitating the removal of a considerable amount of material, and at the same time the material was being used for filling in the bridges or trestles. (R., p. 181.)

Mr. Campbell also testified that the fill was an improvement in the railroad; that they considered a gravel

fill superior to a wooden structure and that it was a permanent improvement that they were making at the time. (R., p. 180.)

During the progress of the work of filling these bridges, interstate trains were passing over the railroad and these bridges in both directions daily (R., p. 181), and it was the undoubted purpose of the respondent company to so do this work as not to interrupt the transportation over its line of either interstate or intrastate trains.

When the work of filling the bridges was first started, what was known as Lidgerwood equipment was used, that is, side-dump cars containing the material to be used were placed on the bridge and a plow run through the material in the cars scraping or plowing out the material which fell outside of the rails and ties. (R., p. 180.)

Respondent's superintendent, Campbell, further testified that when the material reached an elevation so high that it would remain on the track, such equipment could no longer be used and a machine known as a "dozer" or "bull dozer" was used instead. This machine was equipped with projecting wings which tended to widen out the material after it had been dumped. (R., p. 181.) Mr. Campbell further testified that the dozer was not used until the material got so high that it would remain on the track and that its purpose was to level the fill, shovel the material out and make the embankment. (R., pp. 180-181.) The following is an excerpt from his testimony:

"Q. At the time of this accident this bridge 140 had been filled right up into the ties?

A. They don't use the dozer until it gets up high enough so they have to push it out, or widen it out, to continue construction; in—

Q. In other words, you don't use the dozer until it gets level with the ties?

A. Exactly so.

Q. Mr. Kinzell's duties on that kind of work were also to take the shovel and get the rocks off the ties and off the track?

A. Yes, sir.

Q. And after the dozer was taken away when any trains were going by it was necessary that these rocks should be taken off the track?

A. Yes.

Q. That was part of his duties?

A. Yes.

Q. So that trains could pass there with safety?

A. Yes. That was the reason it was done, to make it safe for the operation of trains, so we would not be delaying any through accidents occurring." (R., pp. 181-182.)

Kinzell's duties in connection with the work of filling in this bridge were (1) to determine the particular place where the material might be dumped to the best advantage (R., p. 84), (2) to operate the wings of the dozer in such a way as to spread the material out from the ties and rails (R., p. 86), and (3) to clear the track of loose rock and material so as to avoid the danger of derailing trains or cars. (R., pp. 84-85.)

The method of operation was described by petitioner substantially as follows: A trainload of material ordinarily consisting of about twenty-five cars was dumped, the dozer was then used to spread the material, drawn to one end of the bridge, the train uncoupled from the dozer and returned to the place where the line changes were being made for more material. During the absence of the train the petitioner and

another with their shovels cleared the material from between the rails. Upon the approach of the train of dump cars to the dozer it was the custom to approach at a speed of two or three miles per hour, and a slow order had been issued restricting the speed at which the work train should be operated to four miles per hour. (R., p. 85.) As the train ordinarily coupled to the dozer it was at such a slow speed and so easily that "if the knuckle happened to be closed they would stop and open the knuckle, but if the knuckle happened to be open they would go up and make a careful coupling." (R., p. 85.)

Petitioner had no control over the operations of the work trains, or the manner in which the coupling was made. Those duties were all performed by the trainmen upon the gravel train. (R., pp. 84-5.)

On the day of the accident several trainloads of material had already been dumped on the bridge. At the precise time of the accident Kinzell with a co-laborer was standing upon the dozer with his back to the approaching train holding to a brace-rod with his right hand, determining where he would have the next load of material dumped. Suddenly his companion called to him to look out, and glancing over his shoulder he saw the work train about to strike the dozer at an excessive rate of speed, estimated by Kinzell to be about ten miles per hour. (R., p. 86, 101.) Testimony of the co-employee, Lee, (R., p. 109). Petitioner did not have time to get off the dozer, but grasped the brace-rods with both hands and with all his strength. When the train struck the dozer he was torn from the brace-rods and thrown from the dozer and between the wheels of the first dump car (R., p. 87), suffering injuries which were serious, painful and permanent and which have rendered him a cripple for life. The train

struck the dozer so hard that the other employe was jerked loose from his hold and thrown against a crank shaft. (R., p. 109.)

One of the charges of negligence made by petitioner was that the work trains were customarily equipped with tail air hose so that the brakeman on the rear end of the train could, by opening the valve in the tail air hose, set the air brakes without the necessity of signaling the engineer. (R., p. 4 and 5.)

Petitioner testified that work trains were usually equipped with tail air hose and that he had observed such equipment on the day of his injury on one of the work trains, but did not know whether the other train was so equipped or not (R., pp. 99-100). He also testified to the propriety of having such equipment. Witness Moody, a brakeman, testified that that train was not so equipped. (R., p. 158.)

The negligence charged therefore was:

(1) That the work train, as it made the coupling at the time of the accident, was traveling at an excessive and unusual rate of speed and that any speed in excess of four miles per hour was unreasonable and dangerous.

(2) That the train approached the dozer at a reckless speed and struck the dozer with such force at said high and dangerous rate of speed that the petitioner was thrown therefrom (R., p. 4);

(3) It was also charged that the respondent was careless in failing to keep a proper lookout as the work train was propelled towards the dozer (R., p. 4);

(4) The failure to have a tail air hose.

Kinzell testified that a short time previous to the dozer being struck he had observed the approaching train then about a quarter of a mile away and supposed

that it would take it quite a while to come up to the dozer, traveling at its usual slow rate of speed; he had observed nothing unusual about the speed of the train when he had so seen it (R., p. 86).

The trial court overruled a motion to direct a verdict in favor of the defendant based upon three grounds (1) that there was no evidence of negligence, (2) that the plaintiff assumed the risk, and (3) that the plaintiff was not, at the time of the injury, employed by the defendant in interstate commerce or performing any service in interstate commerce; and submitted the case to the jury as one for their determination under the Federal Employers' Liability Act.

The jury returned a general verdict in favor of the petitioner for \$35,000. At the request of the respondent, certain interrogatories were submitted to the jury and the answers thereto found that the respondent was not guilty of contributory negligence and that no sum should be deducted from the damages sustained by him as attributable to contributory negligence (R., p. 16).

Petitioner moved for a new trial, which motion was denied (R., p. 72). An appeal was taken from the judgment and from the order denying the motion for a new trial.

The Supreme Court of Idaho reversed the judgment on the sole ground that the petitioner was not engaged in interstate commerce at the time of his injury so as to entitle him to maintain an action under the Federal Employers' Liability Act, and directed that the judgment be reversed, with instructions to dismiss the action.

## SPECIFICATION OF ERRORS.

## I.

The Supreme Court of the State of Idaho erred in holding that at the time of his injury the petitioner was not engaged in interstate commerce so as to entitle him to maintain an action for his injuries under the Federal Employers' Liability Act.

## II.

The Supreme Court of Idaho erred in reversing and setting aside the judgment of the District Court of the First Judicial District of the State of Idaho, in and for the County of Shoshone.

## ARGUMENT.

The facts establish:

(1) That the fill was being made to replace a bridge on the interstate line of the defendant which had performed its duty and which in the interest of safe operation required replacement within a short time, and that the work was being performed while that bridge was being used daily by the interstate trains of respondent;

(2) That as an essential and necessary part of his duties the petitioner was required to keep the bridge clear for the passage of these interstate trains.

The trial court's instruction to the jury upon the question of the plaintiff being engaged in interstate commerce is instruction No. 14 (R., p. 29). The instruction fairly presented the law.

The Supreme Court of Idaho was of the opinion that the work was too remote to interstate commerce to be within the act.



The question is clearly presented: Was the petitioner at the time of the injury so employed as to come within the terms of the Federal Employers' Liability Act?

The principles governing this case are well understood and the decisions of this court need not be extensively referred to. We may be permitted, however, to quote from

*Pedersen v. D. L. & W. R. Co.*, 229 U. S. 146,

where it is said:

"The true test always is: Is the work in question a part of the interstate commerce in which the carrier is engaged? \* \* \* Of course, we are not here concerned with the construction of tracks, bridges, engines, or cars which have not as yet become instrumentalities in such commerce, but only with the work of maintaining them in proper condition after they have become such instrumentalities and during their use as such.

True, a track or bridge may be used in both interstate and intrastate commerce, but when it is so used it is none the less an instrumentality of the former; nor does its double use prevent the employment of those who are engaged in its repair or in keeping it in suitable condition for use from being an employment in interstate commerce."

It cannot be said that the work which petitioner was performing at the time of his injury was a matter of indifference to interstate transportation over the respondent's line, nor, we believe, can it be said that his work was so remote from interstate commerce as not to be in a practical sense a part of such commerce. Under all of the testimony, it must be said that this work was being performed for the purpose and to the

end of keeping the interstate railroad line and track of the respondent in suitable condition for use in interstate commerce. Even if it might be considered that it was a matter of indifference to interstate commerce as to whether or not the respondent company should, at that particular time, fill the bridge, instead of delaying the performance of the work until the bridge was in need of immediate repairs, still the company having determined to make the fill at the time, it was no longer a matter of indifference to interstate commerce as to how this work should be done. For the safety and freedom from interruption of the respondent company's interstate business required that this work be done in such a manner as not to delay, or interrupt, or otherwise interfere with the movement of interstate trains.

Had Kinzell and his co-laborer failed in the proper discharge of their duties of spreading the material away from the rails and ties, and in clearing the track of loose rock and dirt to insure the safe running of trains, until the track was so covered with material as to prevent the running of trains, or until a train was wrecked or a car derailed, there could be no question but what the laborers employed to clear the track so as to permit the movement of interstate commerce, would be deemed to have been employed in interstate commerce within the Federal Employers' Liability Act.

- Southern Ry. Co. vs. Puckett*, 244 U. S. 571;  
*Lombardo vs. Boston & M. R. R. Co.*, 223 Fed.  
 427;  
*Columbia & P. S. R. Co. vs. Sauter*, 223 Fed.  
 604;  
*Philadelphia B. & W. R. Co. vs. McConnell*, 228  
 Fed. 263;  
*Thompson vs. Columbia & P. S. R. Co.*, 205 Fed.  
 203;  
*Denver & R. G. Co. vs. Wilson*, 163 Pac. 857.

In *Southern Ry. Company vs. Puckett, supra*, a wreck had occurred on tracks used in interstate commerce, and while the employee was carrying some blocks on his shoulder to be used in jacking up the wrecked car, and replacing it upon the track he stumbled, fell and was injured. This court said:

"From the facts found, it is plain that the object of clearing the tracks entered inseparably into the purpose of jacking up the car, and gave to the operation the character of interstate commerce."

The trestle or bridge which was being filled and the track which was being kept clear for the passage of interstate trains had long been used in interstate commerce. The work was not the construction of a new piece of line which had never become an instrumentality used in interstate commerce. According to the railroad company's own showing, the time was approaching when the bridge must, in order for the railroad company to carry on its interstate business, be either filled or replaced by a new bridge. Had the railroad company delayed until the bridge was no longer capable of supporting the interstate trains passing along the line, the construction of a new bridge in its place would have been directly connected with the transportation of interstate commerce.

*Columbia & P. S. R. Co. v. Sauter*, 223 Fed. 604 (C. C. A. 9th Circuit).

The Supreme Court of Idaho in its opinion concedes that such is the effect of the above decision and does not disagree therewith. In that case bridges maintained by two railroads over a certain stream had been destroyed by freshets and the two companies had joined in the construction of a trestle for the purpose of expediting travel, one company building from one

side of the river and the other company building from the other side. An employe was killed during the work. His administrator prosecuted the action. The deceased was engaged at the time of his death in clearing a space in which piles could be driven, not to support the old bridge, but to support the new trestle that was being constructed. The precise question was whether or not deceased was engaged in interstate commerce at the time he was killed. The court applied the tests announced in the Pedersen case and held that the work was not being done independently of the defendant's interstate commerce, and was not a matter of indifference to such commerce, but was so closely connected therewith as to be a part of such commerce.

It will doubtless be urged by respondent's counsel that the work in the Sauter case was in repairing the old bridge, which had been destroyed by the freshet but reference to page 607 of the 223rd Federal Reporter will disclose the fact that it was agreed by counsel that:

"The deceased was engaged in making clear a space in which piles could be driven, not to support the old bridge, but to support the new trestle."

a work which was distinctly new, but which was so intimately connected with the movement of interstate commerce as to be for all practical purposes a part of such commerce.

Is the replacement, if it precede the actual falling in of the old bridge, different in character from the replacement if the railroad company is dilatory in its duty and waits until the bridge is no longer capable of supporting traffic before it replaces it? In principle, there can be no distinction.

If a man, employed to clear a track after it is in such a condition that interstate transportation is stopped, is within the protection of the act, surely it cannot be argued that those men employed in keeping the road bed in condition so that transportation will not be interrupted are not within the act. For the safety and integrity of interstate commerce depends quite as much upon the road being kept in usable condition as upon its being cleared and opened after it has been permitted to become unsafe or insufficient for such commerce.

In the discharge of petitioner's duties and in the performance of the work in which respondent was engaged, the protection of the respondent company's interstate commerce by keeping the track and bridge clear and in usable condition, entered inseparably into the replacing of the bridge and the replacing of the bridge itself entered into the maintenance of the way as much as the replacement of an old rail with a new one. The instrumentality had been devoted to interstate commerce.

This case is not one wherein it is sought to extend the doctrine of the Pedersen case, but one in which a strict application of the conclusions in that case is determinative in petitioner's favor.

The work in which Kinzell was engaged at the time of the accident was upon an instrumentality already in use in interstate commerce.

In

*San Pedro L. A. & S. L. R. Co. v. Davide*, 210  
Fed. 870,

the work of the employe consisted in ballasting the main track of a railroad then used in interstate commerce, a work differing from that in which petitioner was employed only in the quantity of material used and

the manner of doing the work, and it was held the employe was within the protection of the act.

Following the decision in the Pedersen case, it was attempted to extend the terms of the act to include practically all employees engaged in railroad work however remote it might be to interstate commerce. The act was held not to cover employment in a tunnel which was only partially bored, since it was not in use and never had been in use as an instrumentality for interstate commerce.

*Raymond v. C. M. & St. P. R. Co.*, 243 U. S. 43.

An employe of a railroad company, injured while mining coal in a colliery operated by the railroad company, was not within the act, even though the coal ultimately was intended by the railroad company for use in interstate commerce.

*Delaware L. & W. R. Co. v. Yurkonis*, 238 U. S. 439.

An employe in a machine shop operated by a railroad company for repairing parts of locomotives used both in interstate and intrastate transportation was not within the act while engaged in taking down and putting into a new location in such shop an overhead countershaft through which the power was communicated to some of the machinery used in the repair work.

*Shanks v. D. L. & W. R. Co.*, 239 U. S. 556.

But those cases are inapplicable here. Under the admitted facts in this case, the railroad company was, in filling that trestle, engaged in maintaining its interstate road at that point in proper condition after it had become an instrumentality of interstate commerce and during its use as such.

The Supreme Court of Idaho in this case conceives that the case comes within the rule of new construction work as in the case of

*Raymond v. C. M. & St. P. Ry. Co.*, 243 U. S. 43.

The court holds that filling a trestle which is being used in interstate commerce is new construction and the fill does not become part of the railroad until it is completed and the track is placed upon it instead of upon the trestle. The conclusion is supported by two citations of authority, to which we will refer hereafter.

The conclusion, however, is in direct conflict with the language of this court in the Pedersen case, where it is said:

"Is the work in question a part of the interstate commerce in which the carrier is engaged? \* \* \*

Of course, we are not here concerned with the construction of tracks, bridges, engines, or cars which have not as yet become instrumentalities in such commerce, but only with the work of maintaining them in proper condition after they have become such instrumentalities and during their use as such. \* \*

The point is made that the plaintiff was not, at the time of his injury, engaged in removing the old girder and inserting the new one, but was merely carrying to the place where that work was to be done some of the materials to be used there in. We think there is no merit in this."

Suppose that the progress of the work on that trestle had extended to the point where the petitioner, Kinzell, was taking up a rail of the track to replace it upon the fill instead of upon the bridge. Would he not at that moment have been engaged in work which would bring him within the statute? Suppose he were removing the old ties from the trestle and replacing



them upon the fill. Under the authority of the Pedersen case, would he not have been engaged in interstate commerce? The answers obviously must be that he would have been. So it was necessary preliminary to the relaying of the track, to the entire replacement of the bridge, that this other work should be done, and it was as essential thereto as it was that Pedersen should carry bolts for use in the replacement of an old girder in a bridge.

But the Supreme Court of Idaho holds that the replacement of the track even would not have been an employment within the act and that the fill would not become a part of the railroad until it had been completed and the track placed upon it. In support of its final conclusion that the petitioner was not engaged in interstate commerce at the time of his injury, the Supreme Court of Idaho cites *United States v. C. M. & P. S. Ry. Co.*, 219 Fed. 632, a district court decision, and *Dickinson v. Industrial Board of Illinois*, 280 Ill. 342.

The first case cited was an action by the United States against the railroad company for violation of the Hours of Service law (Act. March 4, 1907, 34 Stat. at L. 1415, Ch. 2939). The case was submitted upon the pleadings and a stipulation. An engineer, who had previously been engaged in interstate commerce, was assigned to duty on an engine hauling a work train engaged in filling a bridge on defendant's interstate line, and he was so wholly engaged in such service for fifty-nine days, during which time he was permitted to remain on duty continuously for more than sixteen hours. The court held that the railroad company was not thereby guilty of violating the Hours of Service law, though the engineer was subject to recall for interstate service during such period and at the

end thereof was reassigned to interstate commerce. The Hours of Service law provides:

"The provisions of this Act shall apply to any common carrier or carriers, their officers, agents, and employees, engaged in the transportation of passengers or property by railroad in the District of Columbia or any Territory of the United States, or from one State or Territory of the United States or the District of Columbia, or from any place in the United States to an adjacent foreign country, or from any place in the United States through a foreign country to any other place in the United States. The term 'railroad' as used in this Act shall include all bridges and ferries used or operated in connection with any railroad, and also all the road in use by any common carrier operating a railroad, whether owned or operated under a contract, agreement, or lease; and the term 'employee' as used in this Act shall be held to mean persons actually engaged in or connected with the movement of any train."

The act applies only to employes engaged in the transportation of passengers or property and is by no means so broad as the Employer's Liability Act. No contention was made by the government that the employe was, because of the character of his work, within the act, but it was contended that he came within the act solely because he had been prior to that time an engineer engaged in interstate commerce and was "potentially" subject to recall. The case would not have been cited had not the court used the words "not repairing" in parenthesis in the following portion of the opinion:

"Now when analyzed, the stipulation means nothing more, as I understand it, than that at one time Crown was regularly employed by the defendant in moving interstate commerce; that thereafter

for a period of 59 days he was regularly employed in operating a work train, wholly within the state of Idaho, for the purpose of filling (not repairing) a bridge upon a line of road which was a part of an interstate highway; that thereafter he again went back into interstate commerce service."

The decision is certainly not in point.

The Illinois case cited, *Dickinson v. Industrial Board of Illinois*, 280 Ill. 342, was one where a carpenter employed by a railroad engaged in both interstate and intrastate commerce, employed in building forms on the margin of a right-of-way into which concrete was to be poured to form retaining walls for the elevation of the tracks, was injured by sawdust flying in his eye. It was held he was not engaged in interstate commerce. He was employed on a structure which had not yet become an instrumentality of interstate commerce. The state supreme court held that his work was a matter of indifference so far as the interstate commerce in which the railroads were engaged was concerned, although the structure to be erected might eventually become an instrumentality of such commerce.

In the case at bar, the petitioner's employment was not a matter of indifference to interstate commerce. In the first place, the structure upon which he was working and which he was filling had already long been used in interstate commerce. In the second place, the work was being performed for the purpose of replacing that structure when it was approaching the end of its usefulness, and improving the interstate roadway at that place. In the third place, his work in keeping the track clear of material which was dumped upon it was not a matter of indifference to the interstate commerce of the railroad company. His failure to perform

that duty or his negligent performance thereof might easily have resulted in the derailment of an interstate train and the interference with interstate traffic. As the superintendent of the railroad said, that work was performed because it was necessary to keep the track clear and prevent accidents and derailments.

The Supreme Court of Idaho concedes and refers to the fact that it was one of the duties of the petitioner to remove dirt and rocks from the track which lodged thereon when the cars were dumped and which might, if allowed to accumulate, interfere with interstate commerce. They dispose, however, of this by holding that it was but an incident to the work of constructing and filling and did not change the character of the employment.

It was just as essential that he should spread the dirt on the outside of the rails away therefrom with the dozer as that he should with the shovels clear the tracks between the rails. In both cases, he was keeping the track clear for the passage of trains. The act of keeping that trestle and that railroad track clear was performing an act for the purpose of furthering interstate commerce.

THE REPLACEMENT OF INSTRUMENTALITIES ALREADY EMPLOYED IN INTERSTATE COMMERCE IS AN ACT IN THE FURTHERANCE OF INTERSTATE COMMERCE.

The work of replacing an old girder with a new one in a bridge used by interstate trains and the work incident thereto in carrying the material to the point of use is an employment in interstate commerce.

*Pedersen v. D. L. & W. R. Co.*, 229 U. S. 146.

The replacing of old rails with new ones brings the employe engaged in such work within the Federal Employers' Liability Act.

*Philadelphia B. & W. R. Co. v. McConnell*, 228 Fed. 263 (C. C. A. 3rd Circuit).

In the above case, the employe was assistant foreman of a gang on a work train. A few days before the injury, the work train had taken new rails to a place where a track was to be repaired. The old rails were moved and new ones installed. On the day plaintiff was injured, the said train and gang were engaged in removing the old rails from where they had been left between the tracks. While plaintiff was on a car in the performance of his duties, members of the gang under the supervision of the foreman threw a rail on the car in such a manner that one end projected beyond the side of the car, was struck by a passing train, thrust against the plaintiff and injured him. The Circuit Court of Appeals used the following language, which is very apt in this case:

"The work of the train on which the plaintiff was employed had nothing to do with the immediate or direct movement of interstate commerce. Being a repair train, its direct relation was to instrumentalities of commerce rather than to the movement of commerce. With respect to its movement on the day of accident, its journey was defined and was wholly within the State of Pennsylvania. \* \* \*

Here the work was not being done independently of the interstate commerce in which the defendant was engaged, nor was the performance of the work a matter of indifference so far as that commerce was concerned. The removal of old rails from between the tracks on the roadbed of

a railroad over which moves heavy traffic, both interstate and intrastate, constitutes keeping the tracks and roadbed in suitable condition for interstate commerce, and is as necessary for the proper maintenance of the tracks and roadbed as renewing the tracks. The work of which the plaintiff's was a part, was the repair of the roadbed by replacing old rails with new ones. This included removing old rails and installing new ones. The work of removing old rails was not complete when they were lifted from their place upon the ties and tossed upon the roadbed, but was complete only when they were carried away from the place where they lay between the tracks."

If the substitution of a heavy rail for a light one, of a new rail for an old one, brings an employee engaged in that work within the terms of the act, and if the work preliminary to the actual laying of the rails and the taking and carrying them away is such as brings him within the act, then why is not the replacement of a wooden bridge by a new bridge or a dirt fill of such character that an employee engaged therein is within the terms of the act, and especially in a case like this where there is no change of route, where the bridge or trestle is used continuously in interstate commerce and the replacement is continued and carried on during such act?

It has been held that an employee engaged in substituting a new bridge for an old one is within the terms of the act.

*Cincinnati N. O. & T. P. R. Co. v. Hall*, 243 Fed. 76.

The decision of the Circuit Court of Appeals for the Sixth Circuit in the above case seems to be directly in point and directly in conflict with the Idaho decision. The facts there were substantially as follows:

Preparatory to the substitution of a new bridge for an old one over Sody creek in Tennessee, on the main line of the defendant's road, the defendant caused a cut to be made in the fill approaching the bridge and immediately next to a stone abutment at the south end of the bridge. The cut was to make a place for a wooden bent, which with another on the north side of the abutment, was to hold up the track and bridge while the abutment was removed and another permanent structure built in its place.

Hood, an employe, was with others engaged on the cut. As the work proceeded, the face of the fill was shored up, planks being placed upright against the face of the cut braced by crosspieces running from the face of the planks to the face of the abutment.

To the end that traffic might not be interrupted, strong stringers were placed under the ties to hold up the tracks, the ends on one side resting on the abutment and on the other on the roadbed itself, or upon a heavy cross sill. The fill was composed of sand and some clay mingled with rocks and boulders. Trains passed over from time to time.

Hood was working under the tracks when the fill caved in, and was fatally hurt. In the course of the opinion, the court says, citing:

*Pedersen v. D. & L. W. R. Co.*, 229 U. S. 146.

"The interstate character of Hood's service is by the agreement admitted; but, since such admission of matter of law may not be conclusive of the court's duty to inquire into its jurisdiction, it may be said the facts bring the case within the act without any doubt."

No distinction can be drawn between the work in which Hood was employed and the work in which peti-



tioner was employed in this case. In each case, the object of the work was to replace a bridge. In both cases, the employe was engaged in work designed to prevent the interruption of traffic during the replacement of the bridges.

Another decision in conflict with the decision of the Supreme Court of Idaho in this case is that of the Circuit Court of Appeals for the Fourth Circuit in

*Southern Ry. Co. v. McGuin*, 240 Fed. 649.

In that case the court held that a sectionman engaged in assisting a railroad surveyor in a survey made to improve a curve in a track used in interstate commerce is employed in interstate commerce within the meaning of the Federal Employers' Liability Act. A few minutes before the deceased was killed, the surveyor had sent him to a designated point to hold a rod by means of which he intended to take a back sight. He was struck by a train and killed. The surveyor completed the work by placing the stakes, but the change in the track was never made. The defendant was a carrier of both interstate and intrastate commerce. The court said:

"The case of *Pedersen v. Lelaware, etc., R. Co.*, 229 U. S. 146, 33 Sup. Ct. 648, 57 L. Ed. 1125, Ann. Cas. 1914C, 154, seems conclusive on the first point. It was there held that the work of keeping in repair the track, roadbed and other instrumentalities of a railroad engaged in interstate commerce is so closely related to interstate commerce as to be in practice and in legal contemplation a part of it. The work held to be a part of interstate commerce was the carrying of bolts or rivets to be used in taking out an old girder of a bridge and putting in a new one. Here the work was surveying and marking the changes to be

made in the position of the cross-ties and rails, so as to make a better curve. No distinction can be founded on the failure of the railroad to complete the work by actually making the changes contemplated. Making the survey was as much a part of the work as laying the rails according to the survey. *The numerous cases in which the work was on things which had not at the time become instrumentalities of interstate commerce obviously have no application.*" (Italics are ours.)

A case closely in point is the decision of the Circuit Court of Appeals for the Fourth Circuit in

*Coal & Coke Ry. Co. v. Deal*, 231 Fed. 604,

where an employe was engaged in setting new telegraph poles to replace defective poles along the railroad. The lines were used to send messages directing the operation of the trains of the company engaged in interstate commerce. The replacement was accomplished first by the erection of the new poles and then merely transferring the wires from the defective poles to the new ones. The court held that the replacement of the old poles with new ones and the removal of the wires was so closely connected with interstate commerce that an employe injured in the setting of the poles was within the terms of the act, and this was before the wires had been transferred to the new poles. The case in principle is directly in point and directly in conflict with the conclusion of the Supreme Court of Idaho.

The work which was being done by petitioner in this case, and by the employes in the several cases cited, upon instrumentalities already used in interstate commerce, is clearly distinguishable from the character of the work in those cases in which the employe was engaged at the time of his injury in working upon new

instrumentalities which had never been used in interstate commerce, and from other cases in which the work being done was at most only incidentally connected with interstate commerce and that connection so remote that it could not be said to be connected therewith in a practical sense.

Let it again be emphasized that the respondent company was anticipating by scarcely a year the time when this bridge must needs be replaced or its interstate commerce be seriously imperiled, and the work of replacing the bridge by a fill was being done while interstate commerce was being conducted over the line, and in a manner to insure the safety and security of such transportation.

#### SCOPE OF REVIEW BY THIS COURT.

The interstate character of petitioner's employment being established, the judgment of the trial court should be affirmed.

The Act of Congress, under authority of which the writ was granted in this case, requires that there be certified to this court for review and determination any cause of the classes specified in the statute. The entire case is open for examination by this court, when in the exercise of its supervisory jurisdiction, it issues a writ of certiorari to bring up the whole record.

*Panama R. Co. v. Napier Shipping Co.*, 166 U. S. 280;

*Hamilton-Brown Shoe Co. v. Wolf Bros. & Co.*, 240 U. S. 251.

While those cases were on writs of certiorari to Federal Courts, there is nothing in the Act of Congress giving to this court supervisory power in certain cases

over the courts of the states which distinguishes the scope or breadth of the review from that to be exercised where the writ of certiorari is directed to a circuit court of appeals.

In a brief of respondent in opposition to petitioner's motion to place this case on the summary docket, it is said after referring to the Act of Congress under authority of which the writ was issued:

"According to the letter of this statute, authority is conferred upon the supreme court by certiorari to require that there be certified to it *for review and determination any cause* of the classes specified. It is *a cause* that may be brought up, not a mere controversy in a cause, nor a question involved therein, but it is *the cause* that may be brought up, and *the cause* may be brought up *for review and determination*. Therefore, the respondent has a right to apprehend that this court may hold that the case in its entirety is here for review and determination. A reason for a literal interpretation of the words of the act is, that it may be presumed that Congress intended that the exercise of its appellate jurisdiction by this court in cases originating in the state courts should be uniform and harmonious with jurisdiction and practice in cases which were originally litigated in federal courts of inferior jurisdiction."

We proceed therefore to a discussion of the essential questions upon which the right of the plaintiff to recover rests.

The complaint charged negligence; the answer pleaded that the defendant was not guilty of negligence, assumption of risk and contributory negligence, in addition to denying that the plaintiff was engaged in interstate commerce.

Upon these questions there is nothing unusual in the case distinguishing it from the ordinary suit for injuries to the person. These questions, however, demand some brief attention, sufficient to show that there was evidence showing or tending to show the negligence of defendant, evidence negating contributory negligence on the part of the plaintiff, and that the evidence was such that it could not be said that the plaintiff had assumed the risk as a matter of law.

#### NEGLIGENCE OF RESPONDENT.

Viewed most favorably to the respondent the question of negligence presented a controverted question of fact. The verdict of the jury settled such question of fact.

*Smiley v. Kansas*, 196 U. S. 447.

Such also is the rule in Idaho.

*Montgomery v. Gray*, 26 Ida. 583-585.

With reference to the negligence in propelling the train at an excessive speed: It has already been pointed out that the gravel train as it was operated ordinarily, approached the dozer at a speed of from two to three miles per hour, and that there was a work order requiring that it should not be operated at a speed in excess of four miles per hour.

On the occasion of the injury, both Kinzell and his co-laborer, Lee, who were upon the dozer at the time of the accident, testified that the train was going at a speed much in excess of four miles an hour, and at a speed of approximately ten miles per hour when it struck the dozer. That it was an unusual speed is shown by the fact that although both Kinzell and Lee

were holding onto the dozer they were jerked loose, Kinzell thrown between the dozer and the train and Lee thrown against the crank shaft.

Specific reference to the testimony may be helpful. Petitioner testified that in all the time he worked upon the dozer it was the custom for the gravel train to approach carefully, at a speed of between two and three miles per hour; to make a slow, careful and gradual coupling; if the knuckle happened to be closed they would stop the train and open the knuckle, if it was open they would back and make a careful coupling. (R., p. 85); that a slow order had been issued by defendant, or at least he had been informed by the roadmaster that a slow order had been issued. (R., p. 85.) This was not denied.

Respondent's witness Moody, brakeman on the gravel train, testified they had an order not to exceed four miles per hour (R., p. 155).

The witness Lee corroborated plaintiff that it was customary for the gravel train to make the coupling with the dozer at a speed of about two miles per hour (R., p. 109).

Plaintiff testified that at the time of his injury the train struck the dozer with such unusual force that his handhold on the crank shaft and brace rod was forcibly broken, and he was knocked loose and thrown from the dozer (R., pp. 86-7). His testimony is positive that had the speed of the gravel train been no greater than four miles per hour the impact would not have been so severe as that which he actually experienced. (R., p. 85.) He also testified, from experience both in general railroad work and particularly in the operation of the dozer, that speed of from two to three miles per hour would be a reasonable speed at which to couple onto the dozer; and the speed on the occasion of his

injury was greater than that. (R., p. 94.) His testimony is positive that it was never customary for the gravel train to strike the dozer with a force used at the time of his injury. (R., p. 90.)

In this testimony the plaintiff is corroborated, not alone by the testimony of Lee, but by his conduct. Lee seems to have realized just preceding the shock that the gravel train was approaching at an unusual rate of speed for he called out a warning to Kinzell. Lee corroborated Kinzell's testimony with reference to the speed of the train and the shock of striking the dozer. (R., pp. 108-9.)

Lee testified the train was traveling at the rate of at least ten miles per hour at the time of the collision (R., p. 109); that the gravel train was not provided with a tail air hose (R., p. 109); and that the air brakes were not applied until after the train struck the dozer (R., p. 109).

This was the testimony of two men who had been working for a considerable length of time upon the dozer in question, and who had been present when the coupling was made on numerous occasions. They knew from experience at what speed, approximately, the coupling was ordinarily made, and had experienced the nature of the impact when the gravel train struck the dozer at the usual speed at which the coupling was customarily made, and they experienced further the vast difference between the impact usually made and the impact felt on the particular occasion when they were both torn loose from the brace rods, one of them thrown from the dozer itself, and the other hurled against the crank shaft.

Employees of the respondent working either upon the gravel train or who, by coincidence happened along the track at about the time of the collision, were called as



witnesses and their testimony created a direct conflict in the evidence and presented a question for the jury.

The complaint also charged that the failure to equip the train with a tail air-hose on the rear car of the gravel train, so that the brakeman near that end of the train could set the air brakes without the necessity of signaling to the engineer, was negligence.

It is further alleged in the complaint that if the gravel train had been provided with a tail air hose and valve, the rear brakeman could himself have stopped the train, and that even if this duty was performed too late to avoid the collision, that the injuries suffered by the plaintiff by being dragged on the ground for a considerable distance would have been avoided.

Upon the trial Kinzell testified that a train such as the gravel train which collided with the dozer, going at a rate of speed of say four miles an hour, could be stopped by the application of the air brakes in from four to ten feet. In explaining the use of the tail air hose, the plaintiff testified that it was for use in emergency cases, where it became necessary for the brakemen to act quickly, and that by opening the valve on the tail air hose the brakes would be applied automatically to every car in the train, and that where so used a train moving four miles per hour could be stopped in from four to ten feet by the brakeman, without any action whatsoever on the part of the engineer. He further said that it was the duty of the rear brakeman on emergency occasions to apply the air brakes by this tail air hose valve (R., pp. 88-89).

Two gravel trains were being used in hauling material at the time of plaintiff's injury. On the day of his injury one of the trains was equipped with a tail air hose. The plaintiff was unable to say whether or not the other train was so equipped, or whether or not the train which collided with the dozer was so equipped

at the time of the accident (R., pp. 99-100). He also testified that if the train was so equipped, the tail air hose was not used and the brakes were not applied until after he was struck (R., p. 89; testimony of Lee, R., p. 109).

Defendant's witnesses testified that the gravel train in question was not equipped with a tail air hose. The evidence of the witnesses for petitioner was positive as to the propriety of equipping a gravel train with such appliance and its use; that such trains were commonly so equipped, and that being so equipped the brakeman could easily have stopped it in a short distance.

The defendant upon this question introduced three of its employes. One of these witnesses, Lake, was the man who had made the model of the dozer, and the extent of his testimony was to the effect that the gravel car was not equipped with a tail air hose, and that had it been it would have been necessary to place a hook near the top of the rear car upon which to hang the hose within reach of the brakeman.

The second witness, Moody, who was the rear brakeman upon the gravel train at the time of the accident, testified that the only reason the tail air hose was not used was that no place had been provided for it, and that the company did not furnish them to use on the cars. (R., p. 158.) He nowhere testified that the gravel train should not have been so equipped.

One other witness, Shaughnessey, testified that no place had been provided on this gravel train, and that there was no such hose in use on the particular train in question.

It was disclosed by the cross-examination of the witness Moody that one of the trains had been equipped with a tail air hose, but it was his contention that such equipment was used only as a signal whistle (R., p.

160-161), no explanation, however, being given why it was practical to use a tail air hose as a whistle and at the same time impractical for the brakeman by opening a valve situated at the same place as the whistle would be, to himself apply the air brakes and stop the train. No one of defendant's witnesses denied the propriety of equipping the train with such appliance.

In this state of the record the court gave to the jury instruction No. 12 (R., p. 28), a reading of which shows that the question was properly submitted. Viewed most favorably to respondent there was a conflict in the evidence and the verdict of the jury has settled the fact.

The negligence of the respondent having been settled by the verdict of the jury, we pass to the defenses:

#### CONTRIBUTORY NEGLIGENCE.

In an examination of the case, it is not necessary to long pause upon this question.

It was maintained by the respondent that the petitioner was guilty of contributory negligence. The matter was expressly submitted to the jury, upon proper instructions, and the jury has found that the petitioner was not guilty of any contributory negligence. See answer to special interrogatory 2 (R., p. 16).

It was the contention of the defendant at the trial that the plaintiff was guilty of contributory negligence in that having seen the train approaching at a distance of about a quarter of a mile, he had then turned his back and ignored its approach. It was the testimony of the petitioner, however, that when he saw the train approaching he noticed nothing unusual in the speed or the manner in which it was approaching; relied on its being operated in the usual way, and proceeded

with the performance of his duty of determining the place where the material would be dumped, supposing that the train would approach and make the coupling in the usual manner. The question in any event was for the jury.

#### ASSUMPTION OF RISK.

The trial court declined to hold, as a matter of law, that the injury to the petitioner resulted from a risk assumed by him. This was done in denying the motion for a directed verdict and in submitting the question to the jury.

It was urged by the railroad company that the injury to petitioner was caused by a risk which had been assumed, the basis of this contention being the fact that Kinzell had seen the train approaching the dozer at a distance of one-quarter of a mile, at which time he had opportunity to leave the dozer.

The question of assumed risk was by the court submitted to the jury under proper instructions, namely, Instructions No. 15, No. 2-A and No. 10-A. By their verdict, the jury has determined that the petitioner did not assume the risk.

Upon the trial, Kinzell testified that he did see the train approaching the dozer a quarter of a mile away; that he saw nothing unusual about it and supposed that it would take quite a while to get up to the dozer, the same as it had been taking them right along (R., pp. 86, 88), and at the usual speed at which the work train was operated it would not have been near the dozer at the time of the accident. He and his co-laborer, therefore, turned their attention to the work of estimating and determining where the coming train-load of material should be dumped, and relying upon the observ-

ance of the slow order and upon the custom of making the coupling at slow speed, petitioner paid no further attention to the approaching train. When he was first warned by the cry of his companion that the train was about to strike the dozer at an excessive rate of speed, he had no time or opportunity to avoid the accident by jumping from the dozer (R., p. 89).

From the foregoing facts, it is clear that the only risk which the petitioner assumed was that attendant upon the making of the coupling at the usual rate of speed, which had not exceeded two or three miles and which by the slow order was limited to four miles. That risk arising from the railroad company's negligence in operating the train and making the coupling at an excessive rate of speed, estimated to be about ten miles an hour, was not assumed unless such fact became known to the petitioner before the accident and while he still had time to avoid the consequences of the company's negligence, and the testimony clearly shows he did not know of this negligence until it was too late to avoid the accident.

*Chesapeake & Ohio R. Co. v. De Atley*, 241 U. S. 310,

is directly in point. There this court held that a railroad employe, though assuming the risk normally incident to the boarding of a moving train in the discharge of his duties, does not assume the risk of injury involved in an attempt to board a train operated at an unusually high and dangerous rate of speed until made aware of the danger, unless the speed and consequent danger were so obvious that an ordinarily careful person in his situation would have observed the one and appreciated the other, and that it was for the jury to say whether a brakeman on a freight train assumed

the risk of injury in an attempt in the discharge of his duties to board the engine of his train, which was moving directly toward him at a speed of twelve miles per hour. The case clearly points out the principle which is controlling here, as follows:

"It is insisted that the true test is not whether the employee did, in fact know the speed of the train and appreciate the danger, but whether he ought to have known and comprehended; whether, in effect, he ought to have anticipated and taken precautions to discover the danger. This is inconsistent with the rule repeatedly laid down and uniformly adhered to by this court. According to our decisions, the settled rule is not that it is the duty of an employee to exercise care to discover extraordinary dangers that may arise from the negligence of the employer or of those for whose conduct the employer is responsible, but that the employee may assume that the employer or his agents have exercised proper care with respect to his safety until notified to the contrary, unless the want of care and the danger arising from it are so obvious that an ordinarily careful person, under the circumstances, would observe and appreciate them."

It will be remembered also, in this connection, that Kinzell had been working on this dozer about a month (R., p. 84), during which time the coupling between the work train and the dozer had always been made at a reasonable rate of speed, not exceeding two or three miles per hour, and in a careful manner (R., p. 85). Under these circumstances, he had a right to assume, until notified to the contrary or until he knew to the contrary, that the approach and coupling would be made in the usual manner.

It cannot be said, as a matter of law, that it was obvious to Kinzell that the respondent's employees were

guilty of negligence or that their negligence was fully known or appreciated by him prior to the warning given by Lee, too late for him to do other than he did in the protection of himself from injury.

#### MEASURE OF DAMAGES.

It is held in

*Chesapeake & Ohio R. Co. v. Kelly*, 241 U. S. 485,

that the question of the proper measure of damages was inseparably connected with the right of action under the Federal statutes and must be settled according to the principles of law enforced in the Federal Courts.

Instruction No. 6 given by the court (R., pp. 26 and 27) is in accord with the principles of law enforced in the Federal Courts.

It has been urged by the respondent upon motion for a new trial that the instruction given denied to it the benefit of the rule that in computing the damages recoverable, the verdict should be based upon the present value of those damages. But under the decision of this court in

*Louisville & N. R. Co. v. Holloway*, 246 U. S. 525,

the instruction did not deny to the respondent the benefit of such rule. Under the authority of the decision last cited, as well as upon general principles, the instructions given fairly presented the question to the jury.



## THE AMOUNT OF RECOVERY.

The nature and character of the injuries of the petitioner, their permanency, his youth and ability to earn, stamp the verdict as a just one.

The trial court, who heard the testimony, saw the petitioner and his condition, declined to disturb it. It does not appear that the action of the state court in sustaining the verdict was based upon an erroneous theory of the Federal law and this court will therefore not interfere with the same.

*Louisville & N. R. Co. v. Holloway*, 246 U. S. 525.

A case of a mere excessive verdict upon the evidence is a matter to be dealt with by the trial court. It does not present a question for re-examination in the Federal Supreme Court.

*Southern Ry. Co. v. Bennett*, 233 U. S. 80.

## INSTRUCTIONS.

An examination of the instructions given and refused, will show that the case was submitted to the jury upon proper instructions.

We respectfully submit that the judgment of the Supreme Court of the State of Idaho should be reversed and the judgment of the District Court of the First Judicial District of the State of Idaho, in and for the County of Shoshone, should be affirmed.

Respectfully submitted,

JOHN P. GRAY,  
JAMES A. WAYNE,  
WILLIAM D. KEETON,  
*Counsel for Petitioner.*

# INDEX

## SUBJECTS.

	Page
ARGUMENT .....	47
ASSIGNMENT OF ERROR .....	18
BRIEF POINTS .....	33
STATEMENT OF CASE .....	1

## CASES CITED.

Atchison, T. & S. F. Ry. vs. Swearingen, 239 U. S., 339.....	40
Baltimore & O. RR. vs. Branson, 242 U. S., 623.....	34
Beaumont vs. Beaumont, 152 Fed. Rep., 55.....	47
Boldt vs. Penna. Ry., 245 U. S., 441.....	42, 46
Bravis vs. C. M. & St. P. Ry., 217 Fed. Rep., 234.....	34, 38, 52
Brown vs. Swineford, 44 Wisc., 282.....	46
Central Vt. Ry. vs. White, 238 U. S., 507.....	40
Chesapeake & O. Ry. vs. De Atley, 241 U. S., 310.....	45
Chesapeake & O. Ry. vs. Galney, 241 U. S., 494.....	43
Chesapeake & O. Ry. vs. Kelly, 241 U. S., 495.....	43
Chicago, B. & Q. RR. vs. Harrington, 241 U. S., 177.....	34
Chicago & Erie Ry. vs. Steele, 183 Ind., 444.....	34, 53
Chicago, St. P., M. & O. Ry. vs. Kroloff, 217 Fed. Rep., 525.....	40
Cincinnati, N. O. & T. P. Ry. vs. Nolan, 170 S. W. Rep., 650.....	46
Coates vs. Union Pacific R. Co., 67 Pac. Rep., 670.....	45
Delaware, L. & W. Ry. vs. Yurkonis, 238 U. S., 439.....	34
Dickinson, Rec'r, vs. Industrial Board, 280 Ill., 342.....	34, 53
Erie RR. Co. vs. Purucker, 244 U. S., 320.....	45
Erie RR. Co. vs. Welsh, 242 U. S., 303.....	33, 34, 47, 51
Garvik vs. Burlington, C., R. I. & N. Ry., 124 Ia., 691.....	46
Gt. Northern Ry. vs. Knapp, 240 U. S., 464.....	—
Gt. Northern Ry. vs. Wiles, 240 U. S., 444.....	41
Guhl vs. Whitcomb, 109 Wisc., 69.....	46
Hanson vs. Gt. Nor. Ry., 242 U. S., 615.....	40, 41
Henderson vs. American Lbr. Co., 70 So. Rep., 620.....	40
Illinois Cent. RR. vs. Skaggs, 240 U. S., 66.....	44
Jackson vs. Industrial Board, of Ill., 117 N. E. Rep., 705.....	38
Jacobs vs. Southern Ry. Co., 241 U. S., 229.....	42
Kanawha Ry. vs. Kerse, 239 U. S., 576.....	45
Lehigh Valley R. Co. vs. Normille, 254 Fed. Rep., 680.....	39
Louisville & N. Ry. vs. Holloway, 246 U. S., 525.....	43
Louisville & N. Ry. vs. Parker, 242 U. S., 13.....	34, 38, 47, 51
Matti vs. Chicago, M. & St. P. Ry., 176 Pac. Rep., 154.....	34
Midland Valley R. Co. vs. Fulgham, 181 Fed. Rep., 91.....	41
Minneapolis & St. L. Ry. vs. Nash, 242 U. S., 619.....	34, 51
Nashville, C. & St. L. vs. Banks, 156 Ky., 609.....	44
New York Cent. Ry. vs. White, 243 U. S., 188.....	34, 52
Norfolk & Western Ry. vs. Earnest, 229 U. S., 114.....	39, 44, 45
Norfolk & Western Ry. vs. Holbrook, 235 U. S., 625.....	43
Osborne vs. Gray, 241 U. S., 16.....	36
Pedersen vs. Delaware, L. & W., 229 U. S., 146.....	35
Pennsylvania Co. vs. Sheeley, 221 Fed. Rep., 901.....	44
Pleasant vs. Fant, 22 Wallace, 116.....	41
Pollock on Torts, 10th Ed., page 485.....	42
Randall vs. B. & O. RR., 109 U. S., 478.....	41
Raymond vs. C. M. & St. P. Ry. Co., 243 U. S., 43.....	2, 34, 35, 36, 50

# INDEX—CASES CITED—Continued

	Page
Ross vs. St. L. & S. F. Ry., 93 Kansas, 517.....	44
Savage vs. Rhode Island Co., 67 Atl. Rep., 633.....	41
St. Louis & S. F. Ry. vs. Brown, 241 U. S., 223.....	44
St. Louis & S. F. Ry. vs. Conarty, 238 U. S., 243.....	40
St. Louis & I. M. Ry. vs. McWhirter, 229 U. S., 265.....	40
Shanks vs. Delaware, L. & W. Ry., 239 U. S., 556.....	34, 50
Seaboard Airline Ry. vs. Horton, 233 U. S., 492.....	39, 42, 45
Seaboard Airline Ry. vs. Koennecke, 239 U. S., 352.....	23
Seaboard Airline Ry. vs. Tilghman, 237 U. S., 499.....	39, 44
Seaboard Airline Ry. vs. Walthour, 43 S. E. Rep., 720.....	41
Southern Ry. vs. Gray, 241 U. S., 333.....	41, 42, 45
Southern Ry. vs. Lloyd, 239 U. S., 496.....	36
Southern Ry. vs. Pitchford, 253 Fed. Rep., 736.....	34, 38
1 Thompson's Trials, 1st Ed., Sec. 620.....	47
1 Thompson's Trials, 1st Ed., Sec. 861.....	46
Throckmorton vs. Holt, 180 U. S., 552.....	47
United States vs. C., M. & P. S. Ry., 219 Fed. Rep., 632.....	34
Waina vs. Penna. Co., 251 Pa., 213; 96 Atl. Rep., 461.....	44
Waldron vs. Waldron, 156 U. S., 361.....	47
Washington Gaslight Co. vs. Laneden, 172 U. S., 534.....	47

IN THE  
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1918.

---

---

WILLIAM KINZELL,

*Petitioner,*

vs.

CHICAGO, MILWAUKEE & ST. PAUL  
RAILWAY COMPANY,

*Respondent.*

No. 485

---

ON WRIT OF CERTIORARI TO THE SUPREME  
COURT OF THE STATE OF IDAHO.

---

BRIEF FOR RESPONENT

---

STATEMENT.

The statement made by the petitioner is not based upon the facts. It is incomplete and calls for a statement by respondent.

The petitioner sued the respondent railroad to recover damages for personal injuries suffered in its service, alleging in his complaint (*Record*, 1, 6) negligence on its part as the cause of said injuries.

The facts of the injury consequential to the accident, which occurred in the doing of the work in which he and the railroad were engaged, are not disputed. Ex-

cept as to those facts, the case was defended on the general issue and the pleas of assumption of risk and contributory negligence.

The work being done, the happening of the accident and the injury suffered, took place within the State of Washington. The workmen's compensation act of that State, in force at the time, makes provision for full compensation to injured employes and precludes all litigation between employer and employe where the injury arises out of employment which is clearly separable and distinguishable from employment in interstate transportation (Laws 1911, Chap. 74). So that if the work being done by the petitioner was not connected with interstate transportation, no legal cause of action accrued at the place where the injury occurred and no action against the respondent can be maintained. *Raymond vs. Chicago, Milwaukee & St. Paul Railway Company*, 243 U. S. 43.

In view of that condition, the petitioner elected to prosecute his cause as one authorized by the Federal Employers' Liability Act (*Record*, 18), thereby taking the burden of proof to establish affirmatively and positively that his injury occurred in connection with work not covered by the Washington compensation act, but with work indispensable to interstate transportation; for such proof is an essential element of the cause of action within the purview of the federal act. The action was commenced and prosecuted in the State of Idaho, and, in the trial court, the petitioner charged two acts of negligence, (a) excessive speed of the train when making the coupling and (b) failure

to have upon the rear car an attachment called "tail air hose," used in stopping a train (*Record* 5).

The court below sent both questions to the jury, a verdict was returned and judgment entered in petitioner's favor. Whether the jury arrived at their verdict on both these grounds or one of them, or, if so, upon which, no one can say, so that if either was improperly submitted, there should be a new trial. By motion for new trial and by appeal to the Supreme Court of that State, the railroad contested the petitioner's charges of negligence, the permanency and seriousness of his injuries, the interstate character of the work in which he was engaged, raised questions as to the fairness of the trial, the sufficiency of the evidence to justify any verdict for petitioner, the excessive verdict, the soundness of the court's ruling in admitting and rejecting evidence and in refusing to give requested instructions to the jury, and also alleged errors of law in the instructions of the Court to the jury (*Record*, 54; *Assignments of Error on file, but not printed*).

On the appeal the whole controversy was re-litigated and federal questions of vital importance, in addition to the one of federal law, were submitted for decision. In disposing of the case that court considered only one federal question,—whether the petitioner suffered injury while performing a service in interstate transportation. It reserved for decision all other federal questions, saying in the opinion:

"While a number of errors are assigned which appear to be worthy of careful consideration, the

question which will dispose of the case, according to the conclusions we have reached, is whether respondent was within the terms of the act (meaning federal act) at the time the injury occurred. The other matters presented will not, therefore, be discussed in this opinion." (*Record*, 279, 280).

On consideration of that single federal question, the judgment was reversed and the trial court was instructed to dismiss the action (*Record*, 282).

The cause is brought to this court by a writ of certiorari, and if, with respect to the one question which the Idaho court decided, this court reaches a contrary conclusion, the railroad is entitled to have all the other federal questions involved in its appeal determined by an appellate tribunal before the judgment for exorbitant damages can be enforced against it. If reversal occurs, we ask that the mandate be in accordance with the customary conclusions of this court, namely, "that the case be remanded for further proceedings not inconsistent with this opinion," so that respondent's rights in the premises will be fully protected.

Of course, if the proceedings granted pursuant to the writ shall eventuate in affirmance, the litigation will be terminated. Not knowing whether in this proceeding under the act of September 6, 1916, the court will exercise its discretion and take cognizance of the case in its entirety and decide all the questions which the Idaho Supreme Court refrained from considering, or, whether it will confine itself to the one question dealt with by that court, we are compelled to lay the whole cause before this court.



*The Work and Petitioner's Connection Therewith.*

The uncontradicted facts which established that petitioner's relief, if any, must be through the Washington compensation act and not by way of the federal statute, are these:

The railroad, at and prior to the time of the accident, was an interstate railroad carrier. Its business, as such, compelled it to do many things having no immediate relation to the transportation of commerce; it was constantly required to construct and build in advance, to be in readiness to substitute the new for the old whenever and wherever needed. This construction work is done in advance of any particular need therefor. None of it, of course, is put in use until the substitution actually occurs.

Long prior to the day in question the railroad determined to do certain excavation work for a new grade near the blind station of Lone Pine, Washington. It had nothing to do with the main line track and was being done away from it, off to one side. When completed the grade would be used in place of the main line track at that particular point. The work necessitated the movement of a large quantity of waste material (*Record*, 179).

Subsequently, another piece of excavation work was determined upon. At the station of Ewan, Washington, it was necessary to excavate in advance for the construction of independent side tracks, stock pens, warehouse and other station facilities (*Record*, 179). This work likewise required wasting a large quantity of

material. The determination of the two improvements in no way had to do with either of the trestles involved. Neither trestle called for action so far as its physical condition was concerned. They were perfect bridges. Whatever connection they had with the work determined upon was incidental and resulted from expediency and economy, as will presently be seen.

Between Lone Pine and Ewan there were two wooden trestles built in 1908 (*Record*, 183); each spanned a dry gulch or coulee. Being of wood, they were fire hazards and were structures which, in time, would either have to be replaced with like material, a steel structure or a permanent embankment. Indifferent to their physical condition, it was determined to waste the material from the aforesaid excavation work in the dry coulees spanned by them, build solid embankments and abandon the trestles, rather than to dump the waste to the side of the right of way where the work was being done. The purpose of the original work, the cause leading up to wasting the material under the trestles, the relation of the waste material to the trestles and their physical condition, were established by respondent's witnesses, Campbell and Pinson. The proof is short and we ask leave to set forth the material parts.

ARCH E. CAMPBELL testified (*Record*, 178):

- Q. What was being done at that point when Mr. Kinzell was hurt?
- A. We were constructing an embankment underneath those bridges which eventually would replace the bridges.

Q. Where did you get the material from originally for the fill,

A. From the vicinity of Lone Pine, Washington.

Q. You were constructing at that point?

A. We were making a line change and grade reduction to make more economical operation at that point.

Q. Where was the line being changed with reference to the main line then in operation?

A. It was on one side of the original line.

Q. When you got through with the earth excavation there and the movement of it to these two places, what other material did you get to complete the fill or the two fills which were being made?

A. We had an improvement to make at Ewan in the nature of a line change, to afford more ground, for station facilities, side track, stock yards, etc., and we utilized the material obtained from that source for the continuation and completion of the fill.

Q. You were then excavating at Ewan for those purposes?

A. Yes, sir.

Q. On the day that Mr. Kinzell was hurt, tell the jury whether or not the fill under either one of those bridges was complete, so that it could be used instead of the bridge.

A. It was not completed under either.

Q. What were the rails and ties resting upon over which your trains were moving on the day Kinzell was hurt?

A. Resting on the bridge itself; not on the embankment.

Q. When were those two fills completed.

A. They were not completed so far as putting the track on them I should say about two months afterwards.

Q. What was done with the top of the bridge itself?

A. We took the rails off and ties off of each bridge and then we gravelled and relaid the track itself upon the fill itself; the bridge being filled was no further support for it after that time (*Record*, 179).

Q. At the time you commenced making the fill, tell the jury whether or not the fill was being made for the purpose of sustaining the bridge itself or in connection with the property.

A. It was an improvement in our railroad. We always consider a gravel fill superior to a wooden structure, and this was a permanent improvement that we were making at that time.

Q. To take the place of the bridge eventually?

A. Yes, sir.

Q. Do you know the physical condition of that bridge when you started to fill it?

A. All I know about it was, that it was in first-class condition (*Record*, 180).

J. F. PINSON testified (*Record*, 182):

Q. You were acquainted with bridges 140 and 142 at the time Mr. Kinzell was hurt?

A. Yes, sir.

Q. Have you at any time made an inspection of either one of those bridges to know its life and capacity?

A. Yes, sir.

Q. From the inspection that you made, Mr. Pinson, and your knowledge of those two bridges, what was the life of both of these bridges at the time these two fills were being constructed?

A. At least two years.

Q. What do you mean by that?

A. Two years from the date of inspection.

Q. When were these two bridges built?

A. In 1908.

Q. What was the condition of the timbers up to the time the two fills were being made with reference to their stability as a bridge?

A. The timber was in good condition.

Q. Were these fills being made for the purpose of sustaining the bridges themselves?

A. No, sir, it was not.

Q. What was the purpose of the two fills?

A. The fills were to eventually replace the bridges.

Q. Examine the blue print, Exhibit 5. What does that show with reference to the line change at Lone Pine?

A. The yellow line shows the line that was being operated and the red line the new line that was being built at that time.

Q. Now examine Exhibit 6 and state what is indicated thereon as being the work of excavation at Ewan.

A. The red lines on this blue print show the main operated line and the spur track at the time this work was going on. The heavy dotted black lines show the excavation which was made at that time (*Record*, 183).

## CROSS-EXAMINATION

Q. When did you make that inspection?

A. In April, 1914.

Q. You said the bridge then had two years of life?

A. At least two years (*Record*, 183).

Q. You mean by that, after that time you would have to fill in there or build a new bridge, is that the idea?

A. Probably at that time. (*Record*, 184).

Such was the work which was being done when petitioner was injured. It was work of excavation, new work, resulting in the abandonment and non-use of an inferior instrumentality for a better one. The wasting continued until the fill was high enough to meet the grade required; this went on for two months after the accident (*Record*, 179.) The fills were then left to settle and pack. Later on and after the fills had settled, so that the rails and ties could be laid thereon (*Record*, 179), the work of substitution was commenced. In the meantime, no part of the trestle timbers were disturbed or torn up and the track was left untouched, resting where it was before the first carload of waste material was dumped below and used independently of the material so dumped (*Record*, 179).

So that the construction of the fills by the wasting of the material from the excavation mentioned, was a matter of indifference and incidental to the movement of interstate commerce. Such commerce moved independently of either the excavation work or the wasting of the material. Instead of making use of the fills after



completion the railroad might well have let them lie dormant for years, or not use them at all.

The petitioner's connection with the particular work was this: As the waste material accumulated below, it came up to the sides of the track on the bridge and was then pushed away from the bridge laterally by a machine called a "bulldozer," consisting of a flat car having adjustable wings extending on each side from the rail and out a distance of about 15 feet and slanting to the rear of the car (see photo exhibits not printed). The opinion of the Idaho court (*Record*, 279), recites that the principal duty of petitioner was "to adjust these wings and, at times when they were waiting for another trainload of dirt, he and Hiram Lee, another employe upon the dozer used shovels to clean out the rocks that lodged between the tracks. The dirt was being brought to the fill by means of two trains of about twenty-five "Air Dump" cars each. When the train approached the bridge it would couple on to the dozer and proceed to the place where the dirt was to be dumped. After dumping the dirt, the cars would be righted and the train would start back, pulling the dozer after it. The wings of the dozer would level down the dirt dumped, spreading it away from the track and thus widen the fill."

It is the contention of the railroad that the excavation work from which the material was taken was new work, and that the wasting of the material thereof by way of building the embankments, was the original construction of a new roadbed; that it was not repair work nor the betterment of the wooden trestles; that the wooden trestles needed no repairing and that none



was being done at the time; that the wasting of the material in the ravines or coulees spanned by the wooden trestles was a matter of economy and good railroading, and, so far as the wooden trestles or the movement of interstate commerce was concerned, was a matter of indifference, might well have been abandoned when half completed or not have been used at all. The whole work did not differ from the building of a tunnel, a cut-off or other improvement which, when completed, would necessitate the abandonment of the old gradient line with its bridges and tracks, although they might be in perfect condition. Because petitioner removed from the track by hand-shovel, portions of the material not caught by the wings of the dozer, cannot change the fact that the work being carried on was the construction of an independent instrument. What he picked up was temporarily dumped on the track in the course of the filling. His act in making use of the hand shovel to throw the minor portions of the material from the track was not different from his previous act in making use of the dozer to spread the major portion away from the track; both acts were the same; the only difference to be found is in the use made of different implements; they changed from dozer to hand shovel. The character of the work one does cannot be changed by making use of different kinds of tools. Interstate commerce was no more blocked or endangered by the dumping of the material upon the track temporarily than by the use made of the track by the work train or the bulldozer, for each had to be removed whenever an interstate train came along. Every interstate track of a railroad is constantly used temporarily for work which is admittedly not interstate commerce. Con-

struction trains, trains moving only state commerce, etc., are apt instances where their presence upon the track would block interstate commerce if they did not get out of the way. Such use cannot change the character of the employe connected with the intrastate train or the construction train.

*The Happening of the Accident and Proof Thereof.*

The two trestles between Lone Pine and Ewan are known in the record as 140 and 142. At the time of the accident the embankment under trestle 142 had received all the waste material needed before settling; it was finished so far as the need of earth material was concerned. The last trainload dumped and spread at bridge 142 had preceded the trainload involved. It had left the bulldozer about 180 feet west of trestle 140 (*Record*, 155), where it was to be picked up by the train in question and moved east to the trestle where the dumping was to be done. This trestle was 1200 feet long (see blue print not printed). The fill under it had not in many places reached the stringers (*Record*, 98, 99). Petitioner had walked from trestle 142, where the last dumping had occurred, and had climbed upon the bulldozer about the time when the dirt train involved was backing across trestle 142, which was a quarter of a mile away (*Record*, 156). He saw the train at this point and claimed he never noticed it again until it was right upon him. His excuse offered for the negligent act was, that he was all the time looking at the 1200-foot trestle to see where to spot the train for dumping (*Record*, 86, 87). Without listening for the approaching train or looking to see where it was, he claimed he was knocked off of the bulldozer by the violent speed at

which the coupling was made. Judging from the physical obstructions in his way (standing behind the high box on the bulldozer), the long distance that he would have to look from the bulldozer to the end of the 1200-foot trestle, and the whole time that he says he was looking after having first seen the train a quarter of a mile away and never again until it made the coupling, he was doing no such thing. His own proof showed that his duties did not require him to have anything to do with the coupling or operation of the train (*Record*, 85).

Moody, the brakeman on top of the front car giving signals to the engineer as the train backed for coupling, testified (*Record*, 154), that when the train was about ready to couple to the dozer, petitioner was standing back toward the center of the dozer and stepped forward, got down and shoved the knuckle open with his foot, then raised up and started back, and, just as he turned and stepped over the brace rod, the train coupled and he was tipped over backwards. The impact, the muddy and slippery condition of the floor of the dozer, caused him to lose his balance, and he was thrown against the dirt car and down (*Record*, 156, 157). He said it was then too late to bring the train to a dead stop, and that, because of the slack of the twenty-five cars running out, the train moved forward and dragged petitioner about ten feet (*Record*, 157.)

McGraw, whom the court discredited in the eyes of the jury by an uncalled-for remark in its presence (*Record*, 251) fully corroborated Moody. No damage whatever was done to any part of the dozer (*Record*, 152).

On the question of the speed of the train, eight eye-witnesses (*Shaughnessy, Record, 149; Moody, Record, 154; McGraw, Record 166; Shields, Record 170; Lombard, Record, 172; Casey, Record 173; Marre, Record 174; Brinton, Record 177*) testified, that the movement of the train at and before the coupling was made, was not greater than four miles an hour. It was pointed out by them that if the speed had been as violent as ten miles an hour, as claimed by petitioner, the bulldozer would have been damaged beyond repair.

Nicholson, a roadmaster of the Northern Pacific Railroad (*Record, 163*), a man of large experience, made it plain that if the movement was such as described by petitioner, the bulldozer would have been "torn up." He answered this question urged by petitioner's counsel on cross-examination:

"Q. Let us assume that the two men are on the dozer, one holding on with his right hand to the brace rod and left hand on the crank here, and the other on the other side holding on to the rod, and at the time this dozer was struck, their hold was broken and they were thrown down, tell us how fast that train would have to be going in order to hit it hard enough to break those men's hold?

A. I should say four miles an hour, four or five miles an hour (*Record, 165*)."

It was pleaded by petitioner and conceded at the trial, and the jury was so told, that a coupling made at four miles an hour was not negligence, and that recovery depended upon the proof that the movement was in excess of four miles an hour (*Record, 4; Complaint, Par. 6*).

The charge that if a "tail air hose" had been attached to the car upon which Moody was riding and signalling the engineer, the accident would have been averted, was never sustained. Over our protest (*Record*, 20; *Instruction 4*), the charge was sent to the jury (*Record*, 143). No such appliance is used in Air Dump cars and none could have been used upon the fully loaded Air Dump car involved (*Record*, 153, 158, 162). Besides, petitioner worked daily with the particular train, knew the fact that no such contrivance was used, and made no protest.

In falling backward, petitioner was thrown against a projecting bolt on the dump car, causing a laceration involving to some extent the outer sphincter; the shoulder was fractured; he was not run over. The overwhelming proof limited his injuries as above. His attempted showing of other physical injuries was feigned. Three eminent surgeons made a thorough physical examination of him six months before the trial (*Dr. Hanson, Record*, 195; *Dr. Mason, Record*, 224; *Dr. Bouffleur, Record*, 230). The examination was voluntary. These surgeons found no paralysis of the arm, no fracture of the hip, and the anus was found to be normal. His manner of using the cane indicated the fictitious character of the injury to the left hip.

After petitioner had closed his case and the defendant had made by the three doctors the complete showing mentioned, the court, over strenuous objections, ordered the petitioner stripped stark naked and in the presence of the jury, the ladies in the audience and witnesses for the defense, placed upon a table and while upon his hands and knees permitted his doctor to

experime  
in (Fs. 1  
nothing c  
strument  
the hand  
the cond  
Kellogg  
six mont  
sible the  
Mason r  
the anus  
that the  
dilated b  
corrobor  
formance  
to reope  
shoulder  
was agai  
ignoranc  
with, tri  
respond  
Nobody  
current v  
of the o  
were kep  
took pla  
may be  
further c  
ignoranc  
know wh  
nothing  
the mind  
in the c

experiment upon the anus by inserting his fingers therein (Fs. 1105 to 1110). The indecent experiment proved nothing except the fact that a man's anus may be instrumentally dilated so that three or four fingers, or the hand, could be inserted. It in no manner disproved the condition of the anus as found by Dr. Mason of Kellogg and Dr. Hanson at the voluntary examination six months prior to the trial. To offset as far as possible the damaging effect of the indecent exposure, Dr. Mason returned to the witness stand and showed how the anus could be juggled with, and that it was his belief that the anus had been instrumentally or artificially dilated by someone (Fs. 1358 to 1361). In this he was corroborated by Dr. Hanson. This contemptuous performance over; the court again permitted the petitioner to reopen his case to make experiments upon his shoulders and body with an electrical appliance. He was again stripped before the jury and his doctor, in ignorance of the machine he was attempting to work with, tried to show that the deltoid muscle failed to respond to electricity and that it was dead to the world. Nobody but the doctor knew (if he did) whether the current was great or small. It was wholly in the hands of the operator, and both court and jury, necessarily, were kept in ignorance. A pretty fair picture of what took place in the court room during this experiment may be found in the *Record*, pages 256 to 263, and further on, pages 267 to 271. Petitioner's doctor plead ignorance of the mechanism of the machine; did not know why it would not work. The result was that nothing was accomplished except to create confusion in the minds of the jurors with relation to the true facts in the case.



With the foregoing outline of the proof made in the case and the intolerable experiments allowed by the court, the case was sent to the jury, and it is hardly necessary to say that it went out with a feeling of prejudice inflamed by what took place at the trial. Nine of them signed a verdict against the respondent in the sum of thirty-five thousand dollars. Three refused to sign or approve the verdict. The petitioner was twenty-nine years old, earning an average of one hundred fifty dollars per month. His life expectancy was thirty-five years. The sum awarded by the jury will, at 7 per cent., earn \$650.00 per year more than his monthly wages would amount to if he lives the allotted period; the excess will pay him \$22,750 for 35 years of what pain and inconvenience he might suffer and on the day of his death there will be left the principal sum which the jury has given him; no allowance having been made for the earning power of the money. Judgment was entered on the verdict.

Respondent took its appeal to the Supreme Court of Idaho from the final judgment (*Record*, 34), and, in addition thereto, it appealed from the order denying its motion for a new trial (*Record*, 73).

---

#### *Errors Relied Upon Involving Federal Questions.*

Under the local practice, all instructions given or refused, all orders, rulings, decisions of every kind occurring upon the trial, are deemed excepted to. (*Idaho Rev. Codes*, Section 4427, as amended by Session Laws 1911, Chap. 229).



Accordingly, the statute gives the right of appeal from an order overruling a motion for new trial as well as the right of appeal from the final judgment (*Idaho Revised Statutes*, Section 4807).

1. Petitioner having failed to produce facts tending to show that he was an employe covered by the federal law, respondent's binding instruction number 16 should have been given (*Instr. 16; Record, 24*). It is as follows:

"You are instructed that there is no evidence in this case to warrant a finding that the plaintiff was, at the time of receiving his injury, employed in interstate commerce or performing a service in said commerce. You will, therefore, return a verdict for the defendant."

2. The erroneous instruction No. 14, (*Record, 29, 30*), given by the court to the jury ought to be dealt with. It evades the only question of fact relating to the employment of petitioner which might have been submitted to the jury. It is as follows:

"You are instructed that the plaintiff was engaged as an employe in interstate commerce if the work which he was doing was so closely connected therewith as to be a part of it. Tracks and bridges are as indispensable to interstate commerce by railroad as are engines and cars and sound, economic reasoning unites with settled rules of law in demanding that all of these instrumentalities be kept in repair. The work of keeping the roadbed, track and bridges in a proper state of repair and upkeep while thus used in interstate commerce is so closely related to such commerce as to be in practice and in legal contemplation a part of it. If you find from the evidence, therefore, that the instru-

mentality, to wit, the railroad track line and the railroad bridge where the plaintiff was working has become an instrumentality in such commerce and that the plaintiff was engaged in the work of maintaining the same in proper condition after they had become such instrumentalities and during their use as such, then it is your duty to find that the plaintiff was engaged in interstate commerce. The true test is, was the work in question a part of the interstate commerce in which the carrier was engaged? In determining this matter you should take into consideration that the statute under which the plaintiff is proceeding proceeds upon the theory that the carrier is charged with the duty of exercising proper care to prevent or correct any defect or insufficiency in its cars, engines, appliances, machinery, track, roadbed, rails, boats, wharves and other equipment used in interstate commerce, so that if you find that the plaintiff was engaged in any work which was being done for the purpose of preventing or correcting any defect or insufficiency and in repairing or keeping in repair or good condition any such instrumentality, railroad, track or bridge which had already been devoted to interstate commerce, then you are instructed that the plaintiff was engaged in interstate commerce."

3. Instruction 4 (*Record*, 20), asked by the respondent demanded the removal from the cause of the charge of negligence relative to the absence of a tail air hose attachment. It was refused. There was no proof tending to show connection between the failure to have it and the happening of the accident. A motion to the same effect was denied (*Record*, 143, 257). The instructions was:

"You are instructed that the fact that there was no tail air hose or air hose apparatus installed

upon, or connected with, the operation of said dirt train has nothing to do with the case. Not only was defendant not required to have such apparatus upon said train or cars, but such fact was known to the plaintiff at the time he received his injury, and, knowing such fact, he cannot complain of the want thereof."

No one can say whether the jury founded its verdict on the absence of the tail air hose or on the excessive speed of the train, or on one of them; or, if upon one of them, upon which. If either was improperly submitted there should be a new trial.

4. The motion to take the whole case from the jury should have been sustained. It is as follows (*Record*, 257):

"1. There is no evidence in the case which will justify the jury in finding that the defendant was guilty of negligence.

2. The evidence is clear and without dispute that the plaintiff was in plain sight of the train, which was moving toward him to make the coupling, and, whatever was its speed, he was either aware thereof, or, by the use of his senses, could have known and apprehended the same and avoided the risk of injury; on account of all of which he assumed the risk of the danger which befell him."

5. The verdict returned for \$35,000 finds no warrant in the evidence and it has no basis except passion and prejudice produced by the court in the conduct of the trial. On appeal to the Idaho Supreme Court, the railroad insisted that the verdict was grossly excessive and was the result of erroneous instructions and based upon the passion and prejudice incited by indecent ex-

periment and the illegal demonstration allowed by the court, as shown by the printed record at pages 265, 258.

6. Respondent requested (*Instr. 14; Record, 24*) the Court to give to the jury a standard for use in computing the amount allowed for decrease, if any, of his earning power, and asked that it be directed to deduct from whatever sum is allowed, the earning power of that sum of money. The instruction rejected by the Court was this:

"If you come to that stage of the case in which you are to make up a verdict for the plaintiff, it will be your duty then to determine how much to allow the plaintiff, if anything, for the diminution or decrease, if any he has sustained, of his power to earn in the future what he has been earning in the past. This element of damage is not certain or fixed and is a kind of estimated damage.

To find out what plaintiff was capable of earning, you must find out what he did earn in the past and how much his capacity to do his former work has been lessened, if at all, by reason of his injury; and, having ascertained that, find out how old he is, and the number of years he probably will live, considering his age, health and habits, and the fact known to us all that men do change their mode of life; that the average man's physical capacity and earning power naturally decline rapidly after fifty years of age, and that some die sooner than others. No one can tell how long a man is going to live, but you can approximate it or average it. In arriving at the amount, you cannot, in any event, allow plaintiff a lump sum equal to what he would receive during the estimated time of his life's expectancy; that would be too much. You must take

into account the earning power of that sum of money. A sum of money now in hand is worth more than a like sum payable in the future, and the future payments which will be derived from said sum through its earning power must be discounted or subtracted from the aggregate amount, otherwise plaintiff will receive more than his earning capacity would have earned him had he received no injury. Whatever sum you determine should be allowed him for the lessening of his earning capacity, if the evidence shows it has been lessened, it must not exceed the present cash value of the aggregate amount which you estimate that his earning capacity has been impaired.

Of course, if you find that plaintiff can now, or will in the future, earn as much as he has been earning in the past, then his earning capacity has not been impaired or damaged and you will allow him nothing on this element of damage."

The only direction given to the jury is the general vague and clouded charge found in instruction 6 (*Record* 26), as follows:

"The plaintiff if entitled to recover, is entitled to fair and reasonable compensation in money for the actual loss which he has sustained on account of the loss of the use of his limbs as shown by the facts in this case and in arriving at the amount of his compensation or compensatory damages you have a right to take into consideration the plaintiff's age, occupation, intelligence and qualification shown by the evidence and his earning capacity and in this connection you have a right to take into consideration the wages or salary which he was earning at and a short time prior to the happening of the accident and injury and you may also take into consideration any pain or suffering which

he may have undergone or suffered, loss of time, diminution of earning capacity, discomfort and general physical disability so far as the same may have affected his ability to walk, run or move about in the usual and ordinary way."

7. Bearing upon the amount of damages to be returned, it was the duty of the trial court to give to the jury some standard to follow in making allowance for plaintiff's contributory negligence.

Respondent requested the court to give the jury instruction 12 (*Record*, 23):

"The defendant has alleged in its answer, and has introduced proof, that plaintiff himself was guilty of negligence which was the direct cause of the injury complained of. Now, the plaintiff's negligence, if you find that he was negligent, is defined in the same manner as that of the defendant. If you believe from the evidence that the plaintiff, at the time the said coupling was being made, was doing that which a prudent man would not have done under the circumstances, or, if he failed to do that which an ordinarily prudent man would have done under all the existing circumstances, having in view the probable danger of his receiving the injury while said coupling was being made,—then I charge you that he is, with respect thereto, guilty of negligence; and if you find that his act was the proximate cause of his injury and that the act of the trainmen in making this coupling was not the proximate cause of the injury to plaintiff, then it will be your duty to find a verdict for the defendant.

In this connection, if you believe from the evidence that the plaintiff's injury was caused partly by the negligent act, if any, of the plaintiff, then



it will be your duty to compare the same in accordance with the instructions which I shall give you. In order to make clear to you what is meant by the comparison of negligence declared by the federal law to be the duty of the jury to make, let me say that your first inquiry should be:—Was the defendant guilty of negligence? Your second inquiry should be:—Was the plaintiff negligent? Your third inquiry should be:—In what degree did the negligence of the plaintiff and the negligence of the defendant contribute to the accident?

Under the federal law it is made your duty to determine what proportion. If the plaintiff's negligence contributed to or caused the accident, to the extent, we will say, of one-third of the entire negligence, then the plaintiff's damages would be reduced one-third; if to the extent of one-half, then his damages would be reduced one-half; if to the extent of two-thirds, then his damages would be reduced two-thirds; and, if his negligence was alone the cause of the accident, then, of course, that would wipe out the damages and your verdict should be in favor of the defendant; if you find that the negligence of the two is equal—that is, that the Railway Company is guilty of negligence and the plaintiff is guilty of equal negligence—you must reduce the damages one-half."

The request was denied. Whatever was said by the trial court is found in instruction 5 (*Record*, 26), as follows:

"The fact that the plaintiff was guilty of contributory negligence is not a complete defense or bar to his right to recover damages in the case, but the jury should in such case diminish the damage in proportion to the amount of negligence attributable to the plaintiff, and as hereinafter instructed."



Thereafter nothing was said by the court other than the following found in instruction 14 (*Record*, 29):

"In an action brought against such common carrier by railroad to recover damages for personal injuries to an employee, the fact that the employee may have been guilty of contributory negligence shall not bar a recovery, but the damages shall be diminished by the jury in proportion to the amount of negligence attributable to such employee."

And in instruction 6 (*Record* 26):

"You must likewise take into consideration any contributory negligence of the plaintiff, if any you find."

8. It was the duty of the court to give to the jury an instruction embodying the facts which respondent claims showed that petitioner assumed the risk. Respondent tendered such instruction. (*Instr.* 6; *Record*, 20):

"If you find that the defendant was negligent in the manner in which the train was being moved against the dozer car for the purpose of coupling thereto, then you should pursue your inquiry further and determine whether or not the plaintiff, Mr. Kinzell, assumed the risk of his employment at the time and under the circumstances under which the accident occurred. Upon this point I advise you as follows:

Assumption of risk—unlike contributory negligence—may be free from any suggestion of negligence on the part of the servant, even though the risks be obvious. The risks may be present notwithstanding the exercise of all reasonable care on his part. Some employments are necessarily fraught

with dangers to the workman, danger that must be, and is, confronted by him in the line of his duty. Such dangers as are normally and necessarily connected with the occupation are presumably taken into account in fixing the rate of wages; and a workman of mature years is taken to assume risks of this sort whether he is actually aware of them or not.

But risks of another sort, not naturally connected with the work, may arise out of the failure of the master to exercise due care in the manner and method of doing the work. These risks the servant assumes the moment he becomes aware of the danger and observes and appreciates the risk of injury therefrom. The servant cannot recover for any injuries resulting from the negligence of the master where the conditions constituting such negligence are known to the servant or are obvious and plainly observable by him and the peril clearly apparent.

Under this last rule of assumption of risks, even though you find that the dirt train was being moved toward and against the dozer car at an excessive and unreasonable rate of speed, still, if the evidence shows that Kinzell, by the exercise of his senses, knew, or ought to have known thereof, and knew and appreciated the danger therefrom, and, though having such knowledge and appreciation, he failed to do that which an ordinarily prudent man would have done under the circumstances—you must then find that he assumed the risk and he cannot recover in this action.

The evidence leaves no doubt that the plaintiff Kinsell had knowledge of the approach of the train and that it would come against the dozer car where he was standing, and the only question upon this branch of the case is whether his experience and

intelligence was such as to enable him to appreciate, and that he did appreciate, the danger from the manner in which the said train was being moved against the dozer car. If he did, he took the risk and your verdict will be for the defendant."

It was refused. Instead, the blind, vague and confusing instruction 15 (*Record*, 30) was given:

"The court instructs you that it is a general rule that a servant entering into employment which is hazardous assumes the usual risks of service and those which are apparent to ordinary observation, and when he accepts or continues in the service with the knowledge of the character of the instrumentalities from which injury may be apprehended, he also assumes the hazard incident to the situation. Those not obviously assumed by the employe are such perils as exist after the master has used due care and precaution to guard the former against danger, and the defective condition of the instrumentalities or appliances which, by the exercise of reasonable care of the master may be apprehended and obviated, and from the consequences of which he is relieved from the responsibility to the servant by reason of the latter's knowledge of the situation is such as is apparent to his observation, or are not known to the employe."

9. The giving of instruction 10 (*Record*, 28) was manifest error. That and number 15 were against the respondent with nothing in its favor. Instruction 10 is as follows:

"You are instructed that if it was the duty of the defendant to make an easy coupling and not to strike the dozer at an unreasonable speed or with unreasonable force taking into consideration the surroundings and if you find it was negligent for

the defendant to make the coupling and strike the  
 rizer as it did strike it on the occasion in question,  
 on the risk of such negligence; if such you find,  
 as not assumed by the plaintiff and the defendant  
 could be responsible therefor."

Instruction 4 (*Record*, 25) is foreign to any issue  
 case. It allowed the jury to find *any* act of *any*  
 ye on the train as an act of negligence, and to  
 the verdict on acts other than the two specific  
 s of negligence. It is as follows:

"You are instructed that if you find from all the  
 evidence of the case that the brakeman Moody and  
 the engineer and other employes on the train at  
 the time of the happening of the accident and injury  
 to the plaintiff in this action was employed by the  
 defendant company as such employees upon the  
 train at the time in question I charge you that the  
 defendant company is bound by the acts of each  
 of such employees within the scope of his employ-  
 ment and authority by the defendant and the de-  
 fendant is responsible for *any act or acts of negli-*  
*gence of such employes* and if either or any of  
 such employees was guilty of any negligent action  
 or conduct as such employee in the discharge of his  
 duty and employment at the time of the accident  
 the defendant is responsible therefor and the em-  
 ployee's negligence in respect to the discharge of  
 his duties as such employee of the defendant com-  
 pany upon the said train in question, if any, was  
 negligence of the defendant."

In sending to the jury the issue as to the  
 use of a "tail air hose" attachment to the car  
 used, the Court gave the following instruction 12  
 (*Record*, 28):

"You are further instructed that if under the

evidence in this case you find that it was usual and customary and reasonable for the defendant to provide what is termed as a tail air hose on the rear end of the train and that by the operation thereof the brakeman on the train could by means of said valves stop the train in case of necessity, and if you further find from the evidence that the defendant was negligent and careless in not so equipping its said train and that the presence thereof would have prevented a collision with the dozer with such force as to knock and jar the plaintiff therefrom, then you are instructed that the defendant would be guilty of negligence."

The instruction authorized the jury to find respondent guilty of negligence, if the mere "presence thereof would have prevented a collision," notwithstanding the want of causal connection between the "presence of a tail air hose" and the happening of the accident.

Compelled to submit to the issue (*Record*, 143) respondent asked the court to tell the jury that the absence of the tail air hose in any event, was a fact known, or should have been known, to respondent (*Instr.* 4; *Record*, 20):

"You are instructed that the fact that there was no tail air hose or air hose apparatus installed upon, or connected with the operation of said dirt train, has nothing to do with this case.

Not only was defendant not required to have such apparatus upon said train or cars, but such fact was known to the plaintiff at the time he received his injury, and, knowing such fact, he cannot complain of the want thereof."

12. By instruction 13 (*Record*, 29) the jury may well have understood and found that the train crew

had the last clear chance to avert the accident, and on that ground, found a verdict. Respondent requested the court to take that question from the jury. It was refused (*Record*, 143). The instruction complained of reads thus:

"You are further instructed that it is the duty of defendant in operating its said train and cars over the track to use reasonable care to keep a lookout ahead and if said defendant and its employes in charge of the train by keeping a lookout could have seen the said dozer upon the track and the plaintiff thereon in ample time to have stopped the said train, or to have reduced the speed of the train so as to make an easy coupling, but notwithstanding such facts failed to keep such lookout, or keeping such lookout failed to reduce the speed of the train so that an easy coupling might be made and that by reason thereof struck the train with great and unusual force and violence, jarring and knocking the plaintiff off of the said dozer, then the defendant was guilty of negligence."

13. In its entire charge the Court failed to instruct the jury as to the burden of proof, except with respect to proof of negligence. The charge is silent as to the necessity of proving the interstate character of petitioner's employment by a preponderance of the evidence. For the lack of such instruction, the verdict is not a valid decision of questions of fact subsidiary to the main question as to the interstate character of the work in which petitioner was employed.

14. During the course of the trial, and over objection (*Record*, 265) the Court ordered all the clothing to be removed from the person of petitioner and, while in that nude condition, allowed his doctor, in the pres-

ence of the jury, to experiment on the arm of petitioner by inserting his fingers therein (*Record*, 265).

While so stripped of his clothing, the Court, over objection (*Record*, 256), permitted the same doctor to experiment on the shoulder of petitioner with a galvanic battery (*Record*, 258). The matter complained of is specified as one of the errors on appeal and in the motion for new trial from which order denying said motion, in addition to its appeal from the final judgment, the railroad appealed (*Record*, 73, 34).

15. After McGraw had testified in chief, he was asked on cross-examination whether he had a prejudice or feeling against petitioner and he answered "no." (*Record*, 169). In rebuttal, over objection, attempt was made to prove that he *was* prejudiced, thereby raising a collateral issue. In sustaining respondent's objection, the court made the following prejudicial remark:— (*Record*, 250, 251):

MR. KORTE:—I object to that as not rebuttal; collateral issue brought out on cross-examination.

THE COURT:—I think it is not proper rebuttal.

MR. GRAY:—Question of interest. He denied interest in that respect, feeling towards this witness.

THE COURT:—*He showed very strongly that he had feeling against Kinzell while upon the witness stand.*

MR. KORTE:—I think your Honor's remark is very prejudicial and I want to except to it, with all deference to the Court."

The effect of the remark denied respondent the right to have the jury, instead of the Court, accept or condemn



McGraw's testimony. He was the only corroborating witness of Moody's statement that the petitioner was fooling with the coupler and not engrossed in looking where to spot the train for dumping.

The errors assigned for review by the Idaho Supreme Court are certified and on file in this Court, but not printed. They are the same errors complained of in the motion for new trial found in the printed record, pages 54 to 71.

## POINTS AND AUTHORITIES.

### *Interstate Transportation.*

1. The single question decided by the Supreme Court of Idaho complained of in this proceeding involves a mixed question of law and fact. The decision rests upon findings of fact, legitimate inferences and conclusions drawn from certain contested facts and the appreciation of the facts introduced in evidence which are final so far as this Court is concerned. No interpretation of any of the provisions of the federal act, or the definition of legal principles in its application, is involved. (*Erie Railroad Co. vs. Welsh*, 242 U.S., 303, 306; *Seaboard Airline Railroad vs. Koennecke*, 239 U.S., 352, 355; *Great Northern Railway Co. vs. Knapp*, 240 U. S., 464, 466).

2. The Idaho decision is right. The statute has been applied in a practical way. Petitioner was not renewing an old bridge; he was constructing a substitute; he was adding to the existing plant by constructing a betterment. In legal contemplation, the work was not different

from construction elsewhere of a new roadbed to supplant the one then in use. It was like the boring of a tunnel through a mountain to take the place of a heavy grade over the mountain or the building of a cut-off to eliminate severe curves, or an elevated track to avoid grade crossings, or a double track to facilitate the movement of commerce, or a new station to supplant the old. It has been ruled that *such* work is not a *necessary* incident to interstate transportation. (*Raymond vs. Chicago, Milwaukee & St. Paul Railway*, 243 U.S., 43; *Shanks vs. Delaware, Lackawanna & Western Railway*, 239 U. S., 556; *Minneapolis & St. Louis Railway Co. vs. Nash*, 242 U.S., 619; *New York Central Railway vs. White*, 243 U. S., 188; *Delaware, Lackawanna & Western Railway vs. Yurkonis* 238 U. S., 439; *Baltimore & Ohio Railroad vs. Branson*, 242 U.S., 623; *Bravis vs. Chicago, Milwaukee & St. Paul Railway*, 217 Fed. Rep., 234 (C. C. A.); *United States vs. Chicago, Milwaukee and Puget Sound Railway*, 219 Fed. Rep., 632 (D. C.); *Chicago & Erie Railway vs. Steele*, 183 Ind., 444; *Dickinson, Receiver vs. Industrial Board*, 280 Ill., 342; *Matti vs. Chicago, Milwaukee & St. Paul Railway*, 176 Pacific Reporter, 154.

3. The nature of the work which petitioner was doing at the time is the test. *Chicago, Burlington & Quincy Railway Co. vs. Harrington*, 241 U.S., 177; *Louisville & Nashville Railway Co. vs. Parker*, 242 U.S. 13; *Erie Railway Co. vs. Welsh*, 242 U.S., 303; *Southern Railway Co. vs. Pitchford*, 253 Fed. Rep., 736 (C.C.A.).

4. The whole work carried on, and not one part of it, must be considered. The primary work was the excavation made for the independent line change at Lone

Pine and the new station facilities at Ewan; the wasting of the material in the gulches under the trestles was secondary and the trestles themselves were matters of indifference. The material had to be wasted somewhere and the two gulches, fortuitously, furnished a most convenient and economical place. It was determined that the solid embankments were worth more than the perfect trestles and that the substitution of the solid embankments for the trestles would be economical and good railroading. The construction of the embankments, as substitutes for the trestles, was being done when the accident happened. The actual substitution and use of the embankments and the abandonment of the trestles occurred long after the petitioner was hurt.

5. If the embankment had been constructed off to one side of the bridge, instead of under it, no one would dare to say that such work had anything to do with interstate transportation. The *location* of the work cannot change its character.

6. To bring his case within the act, petitioner must answer the question.—Was he repairing a bridge or curing defects in an existing track? For, as said in the *Pederson* case:

“We are not here concerned with the construction of tracks, bridges, engines or cars which have not yet become instrumentalities in such commerce, but only the work of maintaining them in proper condition after they have become such instrumentalities and during their use as such.” *Pederson vs. Delaware, Lackawanna & Western Railway*, 229 U.S., 146, 152; *Raymond vs. Chicago, Milwaukee & St. Paul Railway*, 243 U.S., 43.

7. The presumption obtains that petitioner was doing work embraced within the Washington compensation act, and he had the burden of proving not only that he was without the state act but within the federal act. *Raymond vs. Chicago, Milwaukee & St. Paul Railway*, 243 U.S., 43; *Southern Railway vs. Lloyd*, 239 U.S., 496; *Osborne vs. Gray*, 241 U. S., 16.

8. While not conclusive, it is mighty persuasive to know that the Interstate Commerce Commission, in classifying the work of filling bridges and trestles, for purposes of accounting, designates it as construction, additions and betterments, and the cost is charged to investment and not to operation. Under general instructions concerning such work, in a printed pamphlet issued July 1, 1914, it is said:

"Construction (page 9), includes all processes connected with the acquisition and construction of original roadbed and equipment, road extensions, additions and betterments."

"Additions (page 10), are additional facilities, such as additional tracks, bridges and other structures."

"Betterments (page 10), are improvements of existing facilities through the substitution of superior parts for inferior parts retired."

"Grading (page 16). When a part of a bridge or trestle, or the entire structure, is converted by filling into an earth embankment and the bridge is used in lieu of a temporary trestle, for the purpose of filling, it shall be charged to this account (investment, not operation)."

In the classification of operating revenues and expenses, found in printed pamphlet issued July 1st, 1914, it is said:

*"Bridges, trestles and culverts (page 42). This account shall include the cost of repairing and watching bridges, trestles and culverts, including altering and bracing during processes of filling, removing old structures in connection with the construction of new structures."*

9. The physical condition of the trestles was, by respondent, proven to be sound and without flaw, in no state of disrepair and none of its parts required renewal or displacement for at least two years, that being the estimated life of the timbers. The contrary inference drawn by petitioner to support his claim melts away in the sunlight of such true facts.

10. The suggestion made at the bar of the Idaho court, that the material being dumped necessarily strengthened the trestles while the construction work was going on, and, therefore, the work was repair work, is put aside by the findings of that court:

*"It is suggested that the material composing the fill necessarily added support to the trestle in the course of the construction thereof. This is an inference which does not follow from the testimony in the case. But, if it were true, it is but an incident to the work of making the fill and not a purpose in view in its construction."*

11. The additional suggestion that, because petitioner would remove from the tracks such dirt and rocks skipped by the bulldozer, he was aiding interstate commerce, might as well apply to the bulldozer, the dirt train or

himself. The change of tools in spreading the material did not change the character of the work he was doing. It was work of spreading after dumping by use of a bulldozer and hand shovel. Such act did not change the character of the work going on, the object of which must control. *Louisville & Nashville Railway Company vs. Parker*, 242 U. S., 13; *Bravis vs. Chicago, Milwaukee & St. Paul Railway Company*, 217 Fed. Rep., 234 (C.C.A.); *Jackson vs. Industrial Board of Illinois*, 117 N. E. Rep., 705 (Ill.); *Southern Railway Co. vs. Pitchford*, 253 Fed. Rep., 736 (C.C.A.)

12. The final suggestion (hinted in the court below), that the temporary use made of the interstate track *ipso facto* turned the construction work going on into repair work, is ridiculous.

#### *Other Federal Questions.*

13. The railroad is entitled to have all the federal questions involved in its appeal to the state court reviewed by an appellate tribunal. If with respect to the one question which the state court decided, this court reaches a contrary conclusion, either a review of the whole case here should be made, or, it should be remanded to the state appellate court for further proceedings not inconsistent with the opinion. The remittitur of the judgment of that court has been stayed. (See Transcript on file, not printed).

14. In line with the exception taken to the refusal of the trial court to instruct the jury peremptorily as requested by instruction 16, (Error, 1), the giving of instruction 14 (Error 2) was prejudicial, because, in-



stead of being comprehensive of all the conditions to be taken into account, it is merely suggestive of a line of argument on which to predicate a verdict for petitioner. It is ingeniously phrased to avoid responsibility for a decision by the court, as matter of law, of the status of the work, and it evades the only question of fact which might have been submitted to the jury. Respondent's requested instruction 1 (*Record*, 19), which was refused is based upon the evidence and conditions involved. *Norfolk & Western Railway vs. Earnest*, 229, U. S., 114; *Seaboard Air Line Railway vs. Hortos*, 233 U.S., 492; *Seaboard Air Line Railway vs. Tilghman*, 237 U.S., 499).

15. The court below left two questions to the jury with reference to the liability of the defendant:—*First*, whether the movement of the train, when coupling to the dozer, was in excess of four miles per hour (*Instr.* 17-a; *Record*, 33) and with such unnecessary violence as to cause the injury to plaintiff; *second*, whether the "presence of a tail air hose would have prevented a collision with the dozer with such force as to knock and jar petitioner therefrom" (*Instr.* 12, *Record*, 28). As no one can say whether the jury arrived at its verdict in favor of petitioner on both of these grounds or on one of them, and, if so, upon which ground a new trial must be granted if either was improperly submitted. *Lehigh Valley Railroad Co. vs. Normile*, 254 Fed. Rep., 680 (C.C.A.).

16. In its entire charge the court failed to instruct the jury as to the *onus probandi*, except with respect to proof of negligence. Charge 14 is silent as to the necessity of proving the interstate character of the em-



ployment by a preponderance of the evidence. For the lack of such instruction the verdict is not a valid decision of questions subsidiary to the main question dealing with the interstate character of the work in which the plaintiff was employed. *Central Vermont Railway vs. White*, 238 U.S., 507.

17. There is no causal relation between the absence of the tail air hose apparatus and the injury complained of (Error 3). The proof was made that no such contrivance is used on Western Air Dump Cars, and if present it could not, under the circumstances, with the fully loaded car, have been used with safety; that the brakeman on top of the loaded car signalling to the engineer for coupling accomplished all and more than the tail air hose could have served (*Record*, 153, 158, 162). Its absence was not the proximate cause of the damage. *St. Louis & San Francisco Railroad vs. Conarty*, 238 U. S., 243, 249; *St. Louis & Iron Mountain Railway vs. McWhirter*, 229 U.S., 265, 280, 281; *Atchison, Topeka & Santa Fe Railway vs. Swearingen*, 239 U. S., 339, 344; *Hanson vs. Great Northern Railway*, 242 U.S., 615; *Chicago, St. Paul, Minneapolis & Omaha Railway vs. Kroloff*, 217 Fed. Rep., 525; *Henderson vs. American Lumber Company*, 70 Southern Rep., 620 (La.).

18. In sending the issue to the jury, the court (*Instr.* 12; *Record*, 28), held respondent liable if "the brakeman on the train could, by means of the valves, stop the train in cases of necessity," and the defendant was negligent if "the presence thereof (tail air hose) would have prevented a collision." (Error 11). As said in the *Kroloff* case, *supra*, "that only proves that there was an extraordinary and unusual degree of care that the com-

pany could have exercised which might have prevented the accident." In the face of the admitted testimony that the usual method of applying the air in emergency is that which was done by Moody giving a signal to the engineer to make the application, the instruction is erroneous and bad law. No modification by request could have cured it. The railroad was not required to have upon the train all the appliances known to science in order to avoid the accident. *Hanson vs. Great Northern Railway*, 242 U.S., 615.

19. The charge that the speed of the train was more than four miles an hour was not sustained. Eight unimpeached railroad men proved that the speed of the train did not exceed four miles an hour when making the coupling. Petitioner and his one witness proved nothing except that there was a severe jolt and petitioner alone was knocked from the car. This did not sustain the specific charge of negligence. *Southern Railway Co. vs. Gray*, 241 U.S., 333, 339; *Great Northern Railway vs. Wiles*, 240 U.S., 444; *Midland Valley Railroad Co. vs. Fulgham*, 181 Fed., 91, 95; *Randall vs. Baltimore & Ohio Railroad Co.*, 109 U. S., 478.

20. What is called the scintilla rule of evidence is not recognized by the Federal Supreme Court. *Pleasant vs. Fant*, 22 Wallace, 116.

21. Uncontradicted and unimpeached testimony given by railroad men is not so tainted with interest that it can be rejected by the jury, if it is fair, reasonable and consistent. *Savage vs. Rhode Island Co.*, 67 Atl. Rep., 633 (R. I.); *Seaboard Airline Railway vs. Walthour*, 43 S. E. Rep., 720 (Ga.).

22. Petitioner not only assumed the risk of the absence of the tail air hose apparatus, but he took the risk of injury from the movement of the train. He knew the train would come against the dozer at the speed of at least four miles per hour. He had ample opportunity to determine with certainty what the speed of the train was, by merely turning around and observing its movement. This he did not do. After having observed it a quarter of a mile away he turned his back upon it and did not again look until it was too late. He either took the risk of such conduct or there is no justification. for a comparison of negligences or the apportionment of their effect. *Southern Railway Co. vs. Gray*, 241 U.S., 333; *Seaboard Airline Railway vs. Horton*, 233 U.S., 492; *Boldt vs. Pennsylvania Railway Co.*, 245 U.S., 441; *Jacobs vs. Southern Railway Co.*, 241 U.S., 229; *Pollock on Torts*, 10th Ed., page 485.

23. The amount of the verdict returned is based upon an erroneous theory of the federal law. In computing the damage recoverable for future benefits, the principle limiting the recovery to compensation, requires that adequate allowance be made according to circumstances for the earning power of money. Requested instruction 14 (Record, 24), so instructing the jury, was refused, and thereby the respondent's federal right to have just compensation assessed was directly affected. Nowhere in the entire charge did the court say a word on the subject; the only direction given at all on damages was the clouded charge instruction 6 (Record, 26). The failure to tell the jury anything on the subject and to confuse them by generalities was prejudicial error, which is reflected in the excessive

verdict returned. (*Chesapeake & Ohio Railway vs. Gainey*, 241 U.S., 494; *Chesapeake & Ohio Railway vs. Kelly*, 241 U.S., 485; *Louisville & Nashville Railway Company vs. Holloway*, 246 U. S., 525).

24. It is the duty of a trial court, in its relation to the jury, to protect the parties from unjust verdicts. Having in mind that respondent laid bare petitioner's physical condition; that the alleged injury to the hip was first asserted on the morning of the trial (*Record*, 195, 224, 230); that the asserted condition of the anus was a fake and that the doctors believed the anus had been dilated for purposes of the trial (*Record*, 271), the amount allowed by the jury (\$35,000), is more than compensation. If placed at legal interest it would yield an annual income greater than the amount he would earn if he worked every day of his life, would give him \$22,750 for the inconvenience he might suffer and leave the principal to be disposed of at the time of his death. Such amount of damages is not "equivalent to compensation." *Norfolk & Western Railway Co. vs. Holbrook*, 235 U.S., 625, 630; *Chesapeake & Ohio Railway Co. vs. Gainey*, 241 U.S., 494).

25. When the proof points positively to a plaintiff's contributory negligence, it is not enough to merely tell the jury that "it should diminish the damage in proportion to the amount of negligence attributable to the plaintiff," where more is asked. The direction of the statute is that the damages are to be diminished in proportion to the amount of negligence attributable to the negligent employe as compared with the combined negligence of the employe and employer. The refusal (*Rec-*

ord, 23), to give a method to follow in making the proper allowance for petitioner's contributory negligence had no other effect than to aid the excessive verdict. The method outlined by the request, whereby to unravel and apply the formula, was practical and intended for a juror and not a mathematician. The direction must be *mandatory*, and not *optional*, as charged by the court. It is common knowledge that this part of the federal act is a farce, so far as practical application of it has been made in jury trials, unless the jury is instructed upon it. The insistence is borne out in this case. The jury allowed nothing for his negligent act in refusing to take observance of a train which he knew was backing down upon him, until it was upon him. No special finding was made by the jury exonerating the negligent act (*Record*, 16). (*Norfolk & Western Railway vs. Earnest*, 229 U.S. 114; *Seaboard Airline Railway vs. Tilghman*, 237 U. S., 499; *St. Louis & San Francisco Railroad Co. vs. Brown*, 241 U. S., 223; *Illinois Central Railroad Co. vs. Skaggs*, 240 U.S., 66; *Pennsylvania Company vs. Sheeley*, 221 Fed., 901, 906 (C.C.A.); *Waina vs. Pennsylvania Company*, 251 Pa., 213, 96 Atl. Rep., 461; *Nashville, Chicago & St. Louis vs. Banks*, 156 Ky. 609; *Ross vs. St. Louis & San Francisco Railway Co.*, 93 Kansas, 517.)

26. In sending the issue of assumption of risk to the jury, respondent was entitled to have its concrete instruction 6 (*Record*, 21), given to the jury. Where that defence is an issue and the charge given does not cover the same ground as that requested, the refusal is error. If the jury had been instructed as requested, it would have found that the risk was assumed, entitling respondent to a judgment in its favor. The vague instruction 15

(*Record*, 30), given by the court, was a mere statement of general law. A charge must be calculated to give the jury an accurate understanding of the law having reference to the phase of the case to which it is applicable. Reading instruction 10 (*Record*, 28), also excepted to, makes our point more apparent. All knowledge, or means of knowledge, and appreciation of the risk is omitted. (*Chesapeake & Ohio Railway Co. vs. De Atley*, 241 U.S., 310, 315, 316; *Seaboard Airline Railway vs. Horton*, 233 U.S., 492, 508; *Norfolk & Western Railway vs. Earnest*, 229 U.S., 114; *Boldt vs. Pennsylvania Railroad Co.*, 245 U.S., 441; *Erie Railroad Co. vs. Purucker*, 244 U.S., 320; *Kanawha Ry. vs. Kerse*, 239 U.S., 576.)

27. In this respect, instruction 4 (*Record*, 25), is wrong in law; it is misleading and foreign to the issues involved. By its plain terms the jury were at liberty to unearth *any* act against *any* employe, call it negligence and charge it to the railroad. The instruction is unfair and it should have been omitted.

28. Instruction 13 (*Record*, 29), injected a new and false issue into the case. It is erroneous in its relation to the facts and the law. No inference can be drawn from the testimony that the trainmen had the last chance to avoid the accident. The trainmen had the right to assume, until it was too late to stop the train, that petitioner was making use of his senses, saw the train coming and knew when the coupling would be made. The instruction is inapplicable to the fact situation. *Southern Railway Co. vs. Gray*, 241 U.S., 333, 339; *Coates vs. Union Pacific R. Co.*, 67 Pacific Rep., 670 (Utah).



29. When it can be said that the admission of illegal and improper testimony has left a strong impression upon the minds of the jury, exception thereto is available, where defendant's property is sought to be taken from it by the enforcement of the federal statute. Common decency and fair play ought to be enough to convince that respondent was imposed upon by the conduct of the trial in allowing the experiment on the anus of petitioner before the jury, witnesses and audience. Such unwarranted and shameful procedure could have only one object and effect,—to excite the feelings and sympathies of the jury and aggravate the amount of the award. The outrageous amount allowed indicates that it accomplished its purpose. The verdict is tainted by the procedure, and the respondent's federal right to have just compensation based upon legitimate proof, has been denied. In this respect the verdict is unjust and void. (*Brown vs. Swineford*, 44 Wisc., 282; *Garvik vs. The Burlington, Chicago, Rock Island & Northern Railway*, 124 Iowa, 691; *Guhl vs. Whitcomb*, 109 Wisconsin, 69; *Cincinnati, New Orleans & Texas Pacific Railway Co. vs. Nolan*, 170 S.W. Rep., 650 (Ky.); 1 *Thompson's Trials*, 1st Ed., Sec. 861.)

30. The experiment with the galvanic battery in the presence of the jury was not so indecent as the experiment on the anus, but just as prejudicial. It took from the jury the right to pass upon the credibility of the expert witnesses who testified on the condition of the muscles of the shoulder and allowed the issue to be settled by a man with a machine to juggle with. It is said of such experiments that "they are not countenanced, owing to the liability which exists of the



jurors being imposed upon by skillful manipulation or jugglery." 1 *Thompson on Trials*, 1st. Ed., Sec. 620.

31. The jury are the judges of the facts. The right was denied the respondent to have the jury pass upon the credibility of the witness McGraw. The trial court stated to the jury that McGraw was prejudiced against the petitioner and exception was taken to that statement (*Record*, 250, 251). McGraw and Moody were the only ones who saw petitioner at the coupler and both were positive that he was not engaged in the useless task of looking to see where to spot the dirt train. The court was without power to take away the right to have the jury pass upon McGraw's testimony. The statement was prejudicial and sufficient in itself to warrant a new trial. An incurable wound was inflicted. (*Beaumont vs. Beaumont*, 152 Fed., 55, 62; *Waldron vs. Waldron*, 156 U.S., 361, 383; *Washington Gaslight Co. vs. Lansden*, 172 U.S., 534, 555; *Throckmorton vs. Holt*, 180 U.S., 552, 567.)

### ARGUMENT.

Attention is called to the incomplete printed record. The exhibits are not printed; respondent's assignments of error below have been omitted; they are all on file.

Without waiving anything heretofore insisted upon, respondent will confine itself to a short argument on the question decided by the Idaho court. That question rests upon the whole work being accomplished; not on one part of it, but on *all* its parts (*Louisville & Nashville Railway vs. Parker*, 242 U.S., 13; *Erie Railway Company vs. Welsh*, 242 U.S., 303). While positive

proof was made that none of the work was repair or up-keep of the interstate track, the whole work establishes beyond dispute what was proven on the subject.

For if the later work of wasting by filling was a mere incident of the excavation work, the whole purpose was construction and substitution and not repair, and if the wasting of the excavation material was primarily to get rid of it and still use it to advantage, the construction of the fills was a matter of indifference, so far as commerce moving over the trestles was concerned. The wasting of the material might well have been accomplished by depositing it at any place independent of the trestles and yet the trestles would have been in use wholly unrelated to the primary work of excavation and wasting. The only concern or relation the trestles had to the work was, that when the embankments would be large enough and solid enough, the trestles would, by process of substitution, be discarded and no longer used.

Railroads build for the future, and, so building, reckon with the future cost of maintenance and operation. Within such broad range of vision, many costly parts of perfect roadbed and rolling stock are frequently discarded in the accounting, none of which, at the time of abandonment, needed repair or up-keep, and might have been used for years.

And so in this case, the future cost of maintaining the trestles spanning the dry gulches would so far exceed the cost of constructing the solid embankments from the waste material that it would be poor business judgment not to construct them. If the trestles were in such an unhealthy state that they needed up-keep and repair,

a well regulated railroad would hardly have dared go into the cost of opening up particular territory from which to get filling material with which to substitute or repair them. Such an act of railroading would have been extravagance in the face of the fact that the trestles had life for at least two years before even a bent would have to be substituted. Hence, no thought of repair or up-keep was involved in the original work of excavating and wasting. The intent to repair is lacking in the proof. The element to convict has not been established. The whole purpose, from beginning to end, was not to make better the existing trestles (for they were good enough), but to excavate for new lines of track and new station facilities, and, out of the excavated material, to build a new roadbed to take the place of the old one then in use. Petitioner was working on the new roadbed and not on the old one. He was hurt before the new one was completed and long before the abandonment of the old and the substitution of the new.

The burden was on plaintiff to prove, by a preponderance of the evidence, that the work in which he was engaged was *necessary* to the movement of interstate commerce. He made no proof in chief except the fact that the fill was being made under the bridge; that he operated the machinery connected with the bulldozer; that the bridge was used by interstate trains as if no filling had been done and that the work of making the fill was not complete when he was hurt (*Record*, 98, 104, 105).

To offset anything said on the subject, respondent produced the superintendent who had charge of the work and the superintendent of bridges and buildings.

They made the purpose of the work and the condition of the trestles as plain as proof will admit (*Record*, 179, 183).

Whatever relation the petitioner bore to the commerce moving over the trestles was the same as if he had been working on a grade built to one side thereof. It was not different than if he had been helping bore a tunnel intended as a substitute for a heavy grade over the mountain. The identical claims made here were made by Raymond in his case against this railroad. *...Raymond vs. Chicago, Milwaukee & St. Paul Railway*, 243 U.S., 43.

The record in that case will disclose that the whole plea and the brief made rested upon the contention that the tunnel was an improvement over the existing hazardous surface grade; that it was intended to facilitate interstate commerce by betterment and substitution. The class of work and the purpose of the improvement is identical with the work here. The purpose of the work in each case is the same. Of the tunnel work it was said that it was new work, construction work, and not the repair or up-keep of the roadbed then in use.

In *Shanks vs. Delaware & Lackawanna Railway*, 239 U.S., 556, it is significantly said that "the act speaks of interstate commerce, not in a technical sense, but in a practical one better suited to the occasion," and that the work of altering the location of a fixture in a machine shop, where locomotives used in interstate transportation were repaired, was too remote from such transportation to be practically a part of it.

In *New York Central Railway vs. Carr*, 238 U.S., 260,

it is mentioned that the work of the employe must be so directly and immediately connected with the movement of interstate commerce as "to form a *necessary* incident thereof." The court's opinion is properly reflected in the use of the words "a *necessary* incident." A mere incident of a condition is one thing, a *necessary* incident is another; the distinction is important. The work of wasting excavation material under a perfect wooden trestle, which needed no repairs, is not a *necessary* incident in the use of the trestle; until the trestle is abandoned and the embankment is used in its place, it remains an integral part of the railway track. The particular facts in the *Carr* case will demonstrate the force and effect of what is a *necessary* incident to the movement of interstate commerce in the opinion of this court.

The test in the *Carr* case was repeated in *Erie Railroad Co. vs. Welsh*, 242 U.S., 303. There it was held that whether the employe was performing an act connected with interstate transportation "as to be a part of it or a necessary incident thereto \* \* \* depends upon whether the series of acts that he had last performed was properly to be regarded as a succession of separate tasks or as a separate and indivisible task." This case bears out our contention that the *whole* work must be considered before the *intent* can be found against respondent.

In *Louisville & Nashville Railway Co. vs. Parker*, 242 U.S., 13, it is said that the purpose or object of the work, and not the incidental acts connected with the real work being done, must control.

In *Minneapolis & St. Louis Railway Co. vs. Nash*, 242,

U.S., 619, the new structure was on its way to be substituted for the old. What was built was for substitution, but the actual work of substituting the new for the old had not commenced when Nash was hurt.

In *New York Central Railway Co. vs. White*, 243 U.S., 188, a new station and new tracks were being constructed. White was injured while guarding the tools used in doing the work. It was said that his work "bore no direct relation to interstate transportation and had to do solely with construction work, which is clearly distinguishable, as pointed out in *Pedersen vs. Delaware, Lackawanna & Western Railroad Co.*, 229 U.S., 146, 162. And see *Chicago, Burlington & Quincy Railroad vs. Harrington*, 241 U.S., 177; *Raymond vs. Chicago & St. Paul Railway*, this day decided, 243 U. S., 43. This point therefore, is without basis in fact."

The various courts dealing with the question have had no difficulty in understanding work of the class involved, and their rulings are in harmony with the Idaho Supreme Court.

The eighth circuit court had before it a case involving identical work, except its location was off the line then being used and not on the line. In *Bravis vs. Chicago, Milwaukee & St. Paul Railway Co.*, 217 Fed. Rep. 234, a bridge on a short cut-off was being constructed. When completed, the cut-off and bridge would take the place of the main line then used in interstate commerce. Bravis met with injury while on his way home from his work, by a collision of his hand-car with a through train. It was maintained, *first*, that the work of building the cut-off was a necessary incident to interstate commerce,



and, ~~second~~, that, in any event, the act of Bravis in removing the hand-car from the track removed an obstruction and thereby aided interstate commerce. The first claim was disposed of summarily and the second was put aside by the statement that "Bravis bore the same relation to the defendant while he was on a hand-car that he would have borne to it if he had worked on the railway track with its permission and at his own risk on his way to and from the work."

In *Chicago & Erie Railway Co. vs. Steele*, 183 Indiana, 444, ties were being distributed along the main line track for use in constructing a double or second track immediately adjacent thereto. The main line track was used by the work train upon which it dumped the ties for distribution; that court said the work being done was new construction, and that because a tie fell upon the interstate track and was removed therefrom could not change the character of the work.

In *Dickinson, Receiver vs Industrial Board*, 280 Illinois, 342, the construction carried on by the railroads was the elevation of their tracks above the surface grade in the city of Chicago. The employe was hurt while helping in that class of work. It was said that the work of constructing the fills for the elevated tracks was new work, and that "it was a matter of indifference, so far as interstate commerce in which the railroad was engaged was concerned, although the structure to be erected might be an instrument of such commerce." We can see no difference between the substitute being built and the embankments in question.

In applying the federal act to the work being done and



petitioner's connection therewith, the Idaho court took a practical view of the statute and its decision should be affirmed.

Respectfully submitted,

HEMAN H. FIELD,  
GEORGE W. KORTE,  
Counsel for Respondent.

KINZELL *v.* CHICAGO, MILWAUKEE & ST. PAUL  
RAILWAY COMPANY.

CERTIORARI TO THE SUPREME COURT OF THE STATE OF  
IDAHO.

No. 485. Argued April 15, 1919.—Decided May 19, 1919.

In the progress of filling in earth to replace a railroad trestle used in interstate commerce, the earth as dumped attained a level higher than the rails on the trestle, and, to keep the track open for traffic, as well as to widen the embankment, the earth was spread away by scrapers adjusted to a car attached for the purpose to the dump train. *Held*, that an employee in charge of the car, and employed also in removing earth and stones from between the rails, was employed in interstate commerce within the meaning of the Employers' Liability Act.

31 Idaho, 365, reversed.

THE case is stated in the opinion.

*Mr. James A. Wayne*, with whom *Mr. John P. Gray* and *Mr. William D. Keeton* were on the brief, for petitioner.

*Mr. George W. Korte*, with whom *Mr. Heman H. Field* was on the brief, for respondent.

MR. JUSTICE CLARKE delivered the opinion of the court.

This case comes into this court on writ of certiorari to the Supreme Court of the State of Idaho and all of the facts essential to its decision are admitted or are not controverted, and are as follows:

When the accident complained of in the case occurred, the Railway Company, respondent, was engaged in filling with earth a wooden trestle-work bridge, 1200 feet in length, by which its track was carried across a dry gulch

or coulee, the purpose being to continue the track upon the solid embankment when it should be completed.

It was admitted that the Railway Company was engaged in interstate commerce, and that during the progress of the filling the bridge was used for interstate trains. Pursuant to an order of court, the petitioner, an employee of the respondent, elected to rely on the Federal Employers' Liability Act of April 22, 1908, for his right to recover.

Several weeks prior to the accident to the petitioner Kinzell, the work of filling the bridge had progressed to such a stage that when earth was dumped from cars it would be heaped up beside the track higher than the tops of the ties and rails so that it became necessary to spread it by pushing it away from the track toward the edge of the fill, in order to prevent its falling back upon the rails and to widen the embankment. To thus spread the earth an appliance called in the record a "dozer," and sometimes a "bull dozer," was used. It consisted substantially of a flat car body with adjustable wings or scrapers, so designed as to remove any earth which might fall upon the rails and also to press or push that heaped up at the side of the track out to the edge of the embankment.

When a train-load of earth would arrive at the bridge the practice was to couple the "dozer" to the forward end of the cars and then they and the "dozer" would be pushed to the place at which it was desired to unload the earth. After the cars were dumped the pulling of the "dozer" back with them would scrape the earth from the tops of the rails and would push it away from the track, thus contributing to keep the track clear and to widen the embankment.

For several weeks prior to the accident complained of, Kinzell, with an assistant, had been in charge of this "dozer," using it as described, and in addition to this they were required to remove, with shovels, earth or stones which fell upon the track, so, the superintendent of the

Railway testified, as to make it safe for the operation of trains. The rails and ties had not been transferred to the embankment, but were still sustained by the bridge substructure when the accident occurred.

Kinzell was injured by what he claimed was negligence of the Company in the manner of coupling a train of cars to the "dozer" as an immediate preliminary to such an unloading and cleaning movement as we have described.

Much is made in argument of the contention that the fill in progress was not the repairing of, nor the furnishing of support to, the bridge, which, by the testimony of the engineer in charge of bridges, had about a year "of life" remaining when the accident occurred. For this reason it is contended that the principles of *Pedersen v. Delaware, Lackawanna & Western R. R. Co.*, 229 U. S. 146, do not apply. But in the view we take of the case this is not important.

With these facts before it, the Supreme Court of Idaho, in its judgment which we are reviewing, reversed the judgment of the lower court in Kinzell's favor, solely upon the ground that he was not employed in interstate commerce at the time he was injured, and gave this as the reason for its conclusion:

"We are of the opinion that constructing a fill to take the place of a trestle which is being used in interstate commerce is new construction, and that the fill does not become a part of the railroad until it is completed and the track is placed upon it instead of upon the trestle."

Such conclusion, of course, is not derived from any construction of the act of Congress, but rests wholly upon the interpretation which the court placed upon the undisputed facts, as we have stated them.

The Federal Employers' Liability Act provides that:

"Every common carrier by railroad while engaging in commerce between any of the several States . . . shall be liable in damages to any person suffering injury while

he is employed by such carrier in such commerce." (35 Stat. 65, c. 149.)

It being admitted that the Railway Company was engaged in interstate commerce, the only question for decision is whether the petitioner was employed in such commerce, within the meaning of the act as construed by this court.

In *Pedersen v. Delaware, Lackawanna & Western R. R. Co.*, 229 U. S. 146, it is stated that a guide to a decision of such a case as we have here may be found in the questions: Was the work being done independently of the interstate commerce in which the company was engaged or was it so closely connected therewith as to be a part of it? Was its performance a matter of indifference so far as that commerce was concerned or was it in the nature of a duty resting upon the carrier? And in other cases it is said, in substance, that in such inquiries may be found the true test of employment in such commerce in the sense intended by the act. *Shanks v. Delaware, Lackawanna & Western R. R. Co.*, 239 U. S. 556, 558; *New York Central R. R. Co. v. White*, 243 U. S. 188, 192. It is also settled that the doing of work which has for its immediate purpose the furthering of the conduct of interstate commerce constitutes an employment in such commerce within the meaning of the act. *New York Central &c. R. R. Co. v. Carr*, 238 U. S. 260; *Louisville & Nashville R. R. Co. v. Parker*, 242 U. S. 13; *Pecos & Northern Texas Ry. Co. v. Rosenbloom*, 240 U. S. 439; *Southern Ry. Co. v. Puckett*, 244 U. S. 571, 573.

It is in evidence in this case, indeed, it is obvious, that the "dozer" was not called into use until the fill had reached the level of the tops of the ties and had become of such width that the earth when dumped would pile up near the track so as to fall back upon it, if not removed, and that it was used for the double purpose of keeping the rails clear for the interstate commerce passing over them and

for pushing the material to the edge of the embankment to widen it. When to this it is added that a part of Kinzell's duty was, with a shovel, to keep the track between the rails clear of earth and stones, which might fall upon it in the progress of the work, clearly it cannot be soundly said that when he was in the act of preparing to make the required use of the "dozer" he was acting independently of the interstate commerce in which the Railway Company was engaged, or that the performance of his duties was a matter of indifference to the conduct of that commerce. He was "employed" in keeping the interstate track, which was in daily use, clear and safe for interstate trains, or, as the superintendent of the Railway Company stated it, he was engaged with the "dozer" and shovel in making the track safe for the operation of trains and in avoiding delay to the commerce passing over it. Thus the case falls plainly within the scope of the decisions which we have cited, *supra*, and, regardless of what might have been said of the fill before, it had clearly become a part of the interstate railway when the petitioner was injured, for it had reached the stage where it required the work of men and machinery to keep the interstate tracks clear during further construction, and the work of such men was thereafter not only concerned with, it was an intimate and integral part of, the conducting of interstate transportation over the bridge.

We cannot doubt that the Supreme Court of Idaho fell into error in regarding the fill as new construction so unrelated to the conduct of interstate commerce over the bridge at the time the accident to the petitioner occurred that the work being done by him should be regarded as not related to or necessary to the safe conduct of that commerce, and the judgment of that court is, therefore, reversed and the case remanded for further proceedings not inconsistent with this opinion.

*Reversed.*